112-150

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 846.

THE CITY OF FORT SCOTT, PLAINTIFF IN ERROR,

vs.

SAMUEL G. HICKMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MAY 13, 1884.

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1

Declaration.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS.

The City of Fort Scott, in the State of Kansas, was summoned to answer with Samuel G. Hickman in a plea of debt for the sum of $20,000 and $10,000 damages, and thereupon said plaintiff complains and says that he is a resident in the city of Philadelphia, in the State of Pennsylvania, and a citizen thereof, and that the defendant is a municipal corporation organized and existing under the laws of the State of Kansas, in the aforesaid district, and a citizen thereof, and that the matter in controversy in this suit exceeds the sum or value of $500, exclusive of costs. And that heretofore, to wit, on the first day of July, 1871, being thereunto duly authorized and empowered by the laws of the State of Kansas, at the city of Fort Scott, in said State & district, the defendant made and executed its certain several negotiable bonds or writings obligatory, numbered from one to eighty, both inclusive, of the denomination of five hundred dollars each—a copy of bond No. 15 is hereto attached, made a part hereof, and marked Exhibit A, and the residue being of the same tenor and effect and in like words and figures, except the number and the date of the maturity thereof—and then and there issued the same and put them in circulation by virtue of and in accordance with sections 16 & 17 of an act of the Legislature of the State of Kansas, entitled An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868, approved March 8th, 1871, and in pursuance of an ordinance of the city of Fort Scott, entitled An ordinance ordering the grading and macadamizing, &c., of certain streets and parts of streets, approved May 19th, 1871, and that said bonds so recite that the same were so issued under the said act and in pursuance of said ordinance.

EXHIBIT A.

(Copy of bond.)

No. 15. United States of America. $500.

Special Improvement Bond of the City of Fort Scott, Kansas.

Know all men by these presents, that the city of Fort Scott, in the State of Kansas, for valued received, acknowledges itself to owe, and hereby promises to pay, to the holder of this bond, on the first day of July, A. D. one thousand eight hundred and seventy-four, at the Fourth National Bank in the city of New York, the sum of five hundred dollars, lawful money of the United States of America, with interest thereon at the rate of ten per centum per annum, payable annually, at the said national bank, on presentation and surrender of the coupons hereto attached as they severally become due.

In witness whereof, the said city of Fort Scott has caused this bond to be signed by its mayor and attested by its clerk under the corporate seal of the city, this first day of July, A. D. one thousand eight hundred and seventy-one.

[SEAL.] F. R. BOYLE, *Mayor.*

Attest: T. A. CORBETT, *City Clerk.*

(Copy of bond continued.)

Issued in accordance with section 16 and 17 of an act of the Legislature of the State of Kansas, entitled An act relating to the powers and government of cities of the second class, and to repeal certain sections of chapter 19 of the General Statutes of 1868, ap-
2 proved March 8th, 1871, and in pursuance of An ordinance of the city of Fort Scott, entitled An ordinance ordering the grading and macadamizing, &c., of certain streets and parts of streets, approved May 19th, 1871.

Countersigned by the city treasurer, this twentieth day of September, 1871.

J. D. RUSH, *City Treasurer.*

3 And for cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of bond No. 64 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at Fourth National Bank in the city of New York, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the sum of five hundred dollars, with interest at the rate of ten per cent. per annum from the 1st day of July, A. D. 1874.

2.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the bond No. 65 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at Fourth National Bank in the city of New York, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

3.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the bond 66 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at Fourth National Bank in the city of New York, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof *thereof*, and notwithstanding the said promise so to do, the defendant had neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the ate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

4

4.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 67 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at Fourth National Bank of New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

5.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 68 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

6.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 69 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

5

7.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 70 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

8.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 71 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

9.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 78 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

6

10.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 79 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

11.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 80 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

12.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 15 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

7

13.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 17 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

14.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 24 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

15.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 55 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

8

16.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of bond No. 56 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

17.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 57 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

18.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 63 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

9

19.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 58 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

20.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 7 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank of New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

21.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 8 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank, New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

10

22.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 9 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

23.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 10 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

24.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 11 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in the city of New York, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

11

25.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 12 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of ten per cent. per annum from the 1st day of July, A. D. 1874.

26.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 13 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the first day of July, A. D. 1874, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1874.

27.

For a further cause of action the said plaintiff alleges that afterwards, to wit: before the maturity thereof, for a valuable consideration by him paid, he became and now is the owner and holder of the said bond No. 6 in the first count mentioned, whereby the said defendant undertook and promised to pay unto the bearer thereof on the 1st day of July, A. D. 1873, the sum of five hundred dollars, at the Fourth National Bank in New York city, which said bond is of like tenor and effect and in like words and figures with the bond, a copy of which is attached to the first count hereof, except the number thereof, and the date of maturity thereof, and notwithstanding the said promise so to do, the defendant hath neglected and refused to pay, though thereunto requested at the maturity thereof. Wherefore an action hath accrued to the plaintiff to recover the further sum of five hundred dollars, with interest at the rate of 10 per cent. per annum from the 1st day of July, A. D. 1873.

[Fol. 12 is blank.]

13 Wherefore plaintiff prays judgment against defendant for the sum of $20,000 def't and $10,000 damages, and for his costs.

BROWN & CAMPBELL,
Att'ys for Pl'tff.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott, in the State of Kansas. Declaration. Filed July 1, 1880. A. S. Thomas, clerk.

Precipe for Summons.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN *vs.* THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS.	In debt $20,000, damages $10,000.

To the clerk:

You will please issue summons for the defendant in the above-entitled action.

BROWN & CAMBBELL,
Att'ys for Pl'tff.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott, in the State of Kansas. Precipe for summons. Filed July 1, 1880. A. S. Thomas, clerk.

14 In the Circuit Court of the United States for the District of Kansas.

SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS.

We enter ourselves security for costs in said case, and promise to

pay all cost which may accrue to the opposite party in this action, or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated 30th day of June, 1880.

BROWN & CAMPBELL.
S. E. BROWN.

End's'd: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott, in the State of Kan. Security for costs. Filed July 1, 1880. A. S. Thomas, clerk. Approved July 1, 1880. A. S. Thomas, clerk.

15 CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

The United States of America to the marshal of the district of Kansas, Greeting:

You are hereby commanded to notify The City of Fort Scott, in the State of Kansas, that it has been sued by Samuel G. Hickman in the circuit court of the United States for the district of Kansas, and that unless it answer by the 31st day of July, A. D. 1880, the petition of the said Samuel G. Hickman against it, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 11th day of July, A. D. 1880.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 1st day of July, A. D. 1880.

[SEAL.] A. S. THOMAS, *Clerk.*

16 Suit brought for the recovery of money.

Plaintiff prays judgment against defendant for the sum of $20,000 debt and $10,000 damages, and for his costs.

BROWN & CAMPBELL,
Attorneys for Plaintiff.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ July the 1st, 1880. Served same at the county of Bourbon, State and district of Kansas, on the 5th day of July, 1880, by delivering personally to A. J. Bayless a true and certified copy of this writ, with all the endorsements thereon. He, the said A. J. Bayless, being then and there the mayor of the within-named defendant, The City of Fort Scott, in the State of Kansas.

B. F. SIMPSON, *U. S. Marshal.*
By T. C. RUCKER, *Deputy.*

Service----	$2 00
Travel ----	9 90
	$11 90

Paid by Brown & Campbell.

Endorsed: No. 3139. Circuit court of the United States, district of Kansas. Samuel G. Hickman *vs.* The City of Fort Scott, in the State of Kansas. Summons. Issued July 1st, 1880. Returnable July 11, 1880. Filed July 10, 1880. A. S. Thomas, clerk. Brown & Campbell, attorneys for plaintiff.

17 *Demurrer of Defendant to Plaintiff's Declaration.*

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'tiff,
vs.
THE CITY OF FORT SCOTT, KANSAS, Deft. } No. 3139.

Now comes said defendant, by Hill & Sallee, its attorneys, and demurs to the declaration of said plaintiff filed herein on July 1st, 1880, and for grounds of this demurrer says:

1st. That the said declaration, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his action againt this defendant; and that defendant is not bound by law to answer the same; and that said declaration does not state facts sufficient to constitute a cause of action against this defendant.

2nd. For further ground of demurrer defendant says that more than five years have elapsed since the maturity of the obligations sued on in this case, and the bringing of this suit, and the same & each of them are barred by the statute of limitation of the State of Kansas.

Wherefore defendant prays judgment, and that plaintiff may be barred from having or maintaining his aforesaid action againt this defendant.

HILL & SALLEE,
Att'y- for Def't.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott, Kansas. Demurrer. Filed July 28, 1880. A. S. Thomas, clerk. Hill & Sallee, att'y- for def't.

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 22nd day of November, 1880, proceedings were had, and appear of record, in words and figures following, to wit:

FRIDAY, *November 26th*, 1880.

SAMUEL G. HICKMAN
vs. } 3139.
THE CITY OF FORT SCOTT.

Now comes the plaintiff herein, by Brown & Campbell, his attor-

neys, and the defendant, by Hill & Sallee, its attorney-, and thereupon the defendant's demurrer to plaintiff's declaration came on [to be] heard, and was argued by counsel, on consideration whereof it is ordered by the court that said demurrer be, and it is hereby, sustained, and plaintiff has sixty days from this date in which to amend his declaration, and case continued to the next term of this court.

18 *Amendment to Petition.*

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN
vs. } At Law. No. 3139.
THE CITY OF FORT SCOTT.

And now comes the plaintiff, and, pursuant to the order of this court made at the November term, 1880, files this amendment to his petition:

And thereupon he avers that heretofore, to wit, on the 21st day of August, 1878, the defendant, by its city council, passed and adopted a certain resolution, whereof a copy is attached, marked Exhibit "A," wherein and whereby the city clerk of said defendant was instructed to have printed one hundred circulars, as the city attorney might direct, to be sent to the holders of the bonds of said defendant.

That in pursuance of said resolution or order duly entered on the records of said defendant, the said city clerk, under the direction of the said defendant's attorney, did, on the 3d day of September, 1878, cause to be printed and sent to the holders of defendant's bonds a printed circular, whereof a copy is attached and made part hereof as Exhibit "B," the original thereof being signed by the then city clerk of defendant, by order of defendant's council, one of which was sent to the plaintiff and one to each of the other holders of defendant's bonds, wherein and whereby the said defendant fully acknowledged and recognized the said plaintiff's bonds as valid and subsisting obligations of the defendant.

And the plaintiff further avers that heretofore, to wit, on the 8th day of November, 1875, the said defendant recognized the existence and validity of the said plaintiff's said bonds by the payment to him on that day of the sum of two hundred and ninety dollars ($290.00) on account thereof.

Wherefore he prays judgment, as he hath already prayed, for his said debt, interests, and costs.

BROWN & CAMPBELL, *Pff's Att'ys.*

EXHIBIT A.

AUGUST 21st, 1878.

On motion the city clerk was instructed to have one hundred circulars printed, as the city attorney may direct, to be sent to the holders of our city bonds.

EXHIBIT B.

CITY CLERK'S OFFICE, FORT SCOTT, KANSAS, *Sept. 3d*, 1878.

DEAR SIR: The city council of Fort Scott address this to each person holding bonds of the city of Fort Scott, Kansas, with a view to bring about such an amicable adjustment of the indebtedness of our city, if possible, as will be fair to the bond-holders in view of our circumstances, and at the same time be such an one as the city can reasonably expect to be able to meet.

Nearly all of our county, city, and school district indebtedness was incurred at or about the year 1870, which was what would be called our flush times, when money was plenty, and property of ready sale at good figures. In 1870 the assessed valuation of all kinds of property in the city was $1,445,730, as shown by the tax roll, while our assessed valuation for the year 1878 is only $814,547, being a decline in valuation of $631,270, or nearly one-half, a decline which cannot be accounted for upon the basis of the general decline in values, but is doubtless largely attributable to the excessive burden of our debt and taxation. For the year just past our levy for all funds in the city was 5.25 per cent., while this year, had an adequate levy been made, it would have been nearly 7 19 per cent., and this, too, without making any levy for sinking fund purposes to meet our railroad bonded indebtedness. A careful examination of our financial condition convinced us that to meet our indebtedness in its present form, including our share of the county and school district indebtedness, would, within two or three years, require a levy of ten per cent., and should the extreme decline in our assessed valuation continue, the rate would exceed that figure. Our assessed valuation of all kinds of property in the city, beginning with the year 1870, as shown by the tax roll, as follows:

1870	$1,445,730
1871	$1,421,682
1872	$1,382,950
1873	$1,233,624
1874	$1,386,294
1875	$1,071,834
1876	$958,896
1877	$904,368
1878	$814,457

The increase in valuation in 1874 is explained by the fact that nearly 250 acres of outlying additions were that year annexed to the city. In the face of this great decline in value, our indebtedness is rapidly maturing and is yet to be provided for.

The indebtedness of our county in railroad bonds is $300,000, of which $150,000 are in litigation, and upon which there is nearly $40,000 of an accumulation of unpaid interest, and all may yet be adjudged a valid indebtedness. The assessed valuation of the county, including the city, this year is $3,509,164; the valuation of the city being about one-fourth of that, places one-fourth of the

Answer to 9th Count of Amended Declaration.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'tiff,
vs.
THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS, Def't. } At Law. 3139.

Now comes defendant, by its attorneys, Hill & Sallee, and for answer to the 9th count of said declaration as amended, said 9th count being the declaration on bond number 78, mentioned & set forth in said original declaration, says:

1st. Defendant denies that it did on *number* 8th, 1875, or at any time, recognize the existence and validity of said plaintiff's said bonds by the payment to him on that day of the sum of $290.00 on account thereof, but admits & so alleges the facts to be that on said November 8th, 1875, defendant paid to the holder of bond 78 sued on herein the sum of $290.00 on said bond, and on none other of the bonds sued on herein; that the whole of said sum of $290.00 was then and there duly credited and endorsed on said bond 78, and was and is a part payment on said bond 78, and on no other bond sued on herein, as plaintiff then well knew. That said bond 78 now bears said endorsement of $290.00, as before stated, and defendant asks that said bond be brought here into court for inspection by this defendant.

2nd. Defendant avers & says that there is now due on said bond 78 the sum of $43,400, which amount defendant now here offers to pay to plaintiff, & being the same here into court & tenders & offers to pay to plaintiff in full payment of said bond 78.

3rd. Except as admitted, defendant denies each and every allegation in said declaration, as amended, contained, so far as the same relates to & affects said bond 78 sued on herein.

HILL & SALLEE,
Att'ys for Defendant.

Endorsed: No. 3139. In circuit court U. S., dist. Kans. Samuel G. Hickman *vs.* The City of Fort Scott. Answer. Filed May 18, 1881. A. S. Thomas, clerk. By W. W. Gelatt, deputy. Hill & Sallee, att'ys for def't.

Demurrer to Amended Declaration.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Plaintiff,
vs.
THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS, Defendant. } At Law. 3139.

Now comes defendant above named, by its attorneys, Hill & Sallee, and demurs to plaintiff's declaration as amended, and each and every count, except the ninth count thereof, said 9th count being the declaration on bond number 78, mentioned and set forth

22 in said original declaration, and for grounds of demurrer, says:

First. That the said declaration as amended, and the matters therein contained in manner & form as the same are therein stated and set forth in each and every count thereof, except the 9th count, said 9th count being the declaration on bond 78, set forth in said original declaration, are not sufficient in law for said plaintiff to have or maintain his action against this defendant; and that defendant is not bound by law to answer the same; and that said declaration as amended as to each & every count, except the 9th count thereof, does not state facts sufficient to constitute a cause of action against this defendant.

Second. For further ground of demurrer defendant says: That more than five years have elapsed since the maturity of all the obligations sued on in this case, and the bringing of this suit, except as to the bond numbered 78, mentioned and declared on in said original declaration, and the same, and each of them, except said bond numbered 78, are barred by the statute of limitation of the State of Kansas.

Wherefore defendant prays judgment, and that plaintiff may be barred from having or maintaining his aforesaid action against this defendant on all of the obligations set forth in said declaration, except the one numbered 78.

HILL & SALLEE,
Att'ys for Defendant.

Endorsed: No. 3139. In the circuit court U. S., dist. Kan. Samuel G. Hickman *vs.* The City of Fort Scott. Demurrer. Filed May 18, 1881. A. S. Thomas, clerk. By W. W. Gelatt, deputy. Hill & Sallee, att'ys for def't.

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 6th day of June, 1881, proceedings were had, and appear of record, in words and figures following, to wit:

SATURDAY, *June* 25, 1881.

SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS. } 3139.

Demurrer submitted.

U. S. Circuit Court, Dist. of Kan.

SAMUEL G. HICKMAN
vs.
THE CITY OF F'T SCOTT.

The plaintiff brings his action on several special improvement bonds issued by the defendant on July 1st, 1871, and due and payable on the first day of July, 1874.

This suit was commenced July 1, 1880, six years after the maturity of the bonds. The defendant sets up the statute of limitation, and the plaintiff seeks to avoid it by showing an acknowledgement of the debt in writing by the defendant within the statutory limitation. The acknowledgement which —— on by the plaintiff is an address issued in circular for to all the bondholders of the city by authority of a resolution of the mayor and council, of which the following is a copy:

AUGUST 21ST, 1878.

On motion the city clerk was instructed to have one hundred circulars printed, as the city attorney may direct, to be sent to the holders of our city bonds.

The address is lengthy, and sets forth the assumed value of all the property of the city for several years preceding, and also sets forth a list of the indebtedness of the city, among which is
23 this item, "city special improvement bonds, and accrued interest $45,000," and then it goes on to show several reasons and arguments why the creditors of the city should agree to some compromise of the debts, and accept bonds for a lesser sum, &c., &c.

The whole tenor of the circular being to demonstrate the inability of the city to pay its bonds in full, and the injustice of compelling such payment. The only distinctive allegation in reference to these bonds is the one before stated, classing them among the indebtedness of the city. This address was not signed by any one, but at the bottom is the following:

"By order of the city council of the city of Fort Scott." "September 3rd, 1878."

Is this an acknowledgment in writing, signed by the party to be charged, such as the law contemplated should take the case from the operation of the statute of limitation?

I think not; in my opinion the cases of Bell *vs.* Morrison, 1 Peters, 351, and Hanson *vs.* Towle, adm'r, 19 Kan., 281, are in point.

The case of Bell *vs.* Morrison is a leading case, and the requisites of the acknowledgement to relieve a case of the statute is discussed at length.

The case in 19th Kansas is a judicial construction by the supreme court of this State of the very statute in question, and of itself is sufficient authority for the guidance of this court in construing a statute of the State.

A few words of the court in that case epitomize the law as follows:

"A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an acknowledgement as is contemplated by the statute. *This must be an unqualified and direct admission of a present subsisting debt on which the party is liable and which he is willing to pay.*"

Now, apply this rule to the case at bar, and it is very clear it will not stand the test.

Aside from the question whether the claimed acknowledgement is signed by the party to be charged, there is no unqualified and direct admission of this debt with an acknowledgement of defendant's willingness to pay.

On the contrary, the defendant expresses a decided unwillingness to pay the debt or to acknowledge its justness.

The whole tenor & purpose of the address is to secure a compromise and a scaling down of the defendant's indebtedness, and for that purpose its assets are made to appear as small and its debts as large as possible.

There was a partial payment made by the city on one of the bonds which should be credited, and judgment go for the balance.

As to the other bonds the demurrer must be sustained.

Endorsed: No. 3139. Hickman *vs.* The City of F't Scott. Opinion. Filed Oct. 10, 1881. A. S. Thomas, clerk.

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 28th day of November, 1881, proceedings were had, and appear of record, in words and figures following, to wit:

MONDAY, *November 28th*, 1881.

SAMUEL G. HICKMAN
vs.
THE CITY OF F'T SCOTT, IN THE STATE OF KANSAS. } 3139.

24 Now comes the plaintiff herein, by S. E. Brown, Esq., his attorney, and, on his motion, it is ordered by the court that he be allowed to amend his petition herein.

In the Circuit Court of the United States, District of Kansas.

HICKMAN *vs.* THE CITY OF FORT SCOTT.

And now comes the pl'ff, & and by leave of court first had & obtained, amends the declaration & amendment thereto, and says that the circular, so-called, to wit, the acknowledgment of said debt, a copy whereof is attached to said amendment, was signed by S. S. Davis, city clerk of said city, & sealed with the seal of said city, which said signature, in the copy so attached, was, by inadvertence, omitted by a copying clerk in the office of pl'ff's att'ys, & such omission was not discovered until after the filing of the opinion of the court herein.

2nd. And by way of supplement & amendment the pl'ff avers that since the last term of this court the pl'ff learned, & the fact is, that heretofore, to wit, on the 1st day of July, 1875, the def't paid on account of each of the said bonds sued on in this action, the interest due; that is to say, one coupon from each bond, said coupon being as & for the interest due on said bond.

Wherefore pl'ff prays judgment as heretofore.

BROWN & CAMPBELL,
Pl'ff's Att'y.

[Endorsed:] No. 3139. In U. S. C. C. Hickman *vs.* City Fort Scott, & amendment. Filed Nov. 28, 1881. A. S. Thomas, clerk.

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 28th day of November, 1881, proceedings were had, and appear of record, in words and figures following, to wit:

WEDNESDAY, *November* 30, 1881.

SAMUEL G. HICKMAN
vs. } 3139.
THE CITY OF FORT SCOTT, IN STATE OF KANSAS.

On motion of defendant it is ordered that the defendant have 30 days to plead after the filing of the amendment to the petition by plaintiff.

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, the 5th day of June, 1882, proceedings were had, and appear of record, in words and figures following, to wit:

TUESDAY, *June 8th*, 1882.

SAMUEL G. HICKMAN, Pl'tiff,
vs. } 3139.
THE CITY OF FORT SCOTT, KANSAS, Def't.

Now, on this day, came the parties, by their att'ys, and by consent of both parties this cause is continued until the next term of this court, and by like consent said case is set for trial on the first trial day of said term. By like consent defendant has leave to file a dem. to the 1st count of plaintiff's amendment to his amended petition, and an answer to the second count thereof; which pleadings are accordingly filed and said cause continued.

25 *Demurrer to 1st Count of the Amendment to Amended Declaration.*

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'tiff,
vs. } 3139.
THE CITY OF FORT SCOTT, KANSAS, Def't.

Now comes defendant, above named, by its attorney, J. H. Sallee, leave of court had, & demurs to the first count of plaintiff's amendment to his amended declaration, and for grounds of this demurrer says:

1st. That the said first count, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for said plaintiff to have or maintain two actions

against this defendant, & that defendant is not bound by law to answer the same; and that said first count in said amendment to said amended declaration does not state facts sufficient to constitute a cause of action against this defendant.

2nd. For further grounds of demurrer defendant says, that more than five years have elapsed since the maturity of all the obligations sued on in this case, and the bringing of this suit, except as to bond number 78, mentioned & declared on in said original declaration, and the same and each of them, except bond 78, are barred by the statute of limitations of the State of Kansas.

Wherefore defendant prays judgment, & that plaintiff be barred from having or maintaining his aforesaid action against this defendant on all of the obligations set forth in said declaration, except the one numbered 78.

J. H. SALLEE,
Att'y for Def't.

[Endorsed:] No. 3139. Hickman *vs.* City of Fort Scott, Kan. Dem. to 1st am't of amendment to amended pet. Filed June 8th, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, deputy. J. H. Sallee, att'y for def't.

Answer to 2nd Count of Amendment to Amended Pet.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'tiff,
vs.
THE CITY OF FORT SCOTT, KANSAS, Def't. } 3139.

Now comes defendant, leave of court had, & for answer to the second count of plaintiff's amendment to his amended petition, answering, says:

1st. Defendant denies that it paid, on July 1st, 1875, on account of said bond sued on herein, the interest due, and denies that it paid on said date one of the coupons from each of said bonds.

2nd. Defendant admits that on Nov. 8, 1875, it paid $290.00 on bond 78, sued on herein, & on no other bond sued on herein; that the whole of said sum was credited & paid on bond 78, as alleged in defendant's answer, filed herein May 18, 1881.

3rd. Except as admitted, defendant denies each & any allegation in said second count contained.

Wherefore defendant demands judgment for its costs.

J. H. SALLEE,
Att'y for Def't.

[Endorsed:] No. 3139. Hickman *vs.* City of Fort Scott. Answer to 2nd count of amendment to amended decl'r. Filed June 8, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, deputy. J. H. Sallee, att'y for def't.

26 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for

the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 27th day of November, 1883, proceedings were had, and appear of record, in words and figures following, to wit:

MONDAY, *December* 4, 1882.

SAMUEL G. HICKMAN
vs. } 3139.
THE CITY OF FORT SCOTT.

It is ordered by the court that the defendant have leave to withdraw demurrer herein and file answer in thirty days from this date.

27 *Answer.*

In the Circuit Court of the U. S., District of Kansas.

SAMUEL G. HICKMAN, Pl'tiff, *vs.* THE CITY OF FORT SCOTT, Def't.

Now, on this day comes defendant, leave first had, and for answer to plaintiff's declaration & amended declaration, answering, says:

1st. Except as hereinafter admitted, defendant denies each and every allegation in said declaration & the amendments thereto contained.

2d. Defendant denies that it paid, on July 1st, 1875, on account of said bonds sued on herein, the interest due, and denies that it paid on said date one of the coupons from each of said bonds.

3d. Defendant admits that on November 8th, 1875, it paid $290.00 on bond 78 sued on herein, but said payment was made on no other bond sued on herein; that the whole of said sum of $290.00 was credited and paid on said bond 78, as alleged in defendant's answer filed herein May 18th, 1881, and so as paid upon said bond 78 without reference to any other bond sued on herein, and no sum whatever was ever paid on any other bond since the maturity thereof.

4th. Defendant denies that it did, on November 8th, 1875, or at any other time thereafter, recognize the existence and validity of said plaintiff's said bonds by the payment to him on that day of the sum of $290.00 on account thereof; but admits, & so alleges the facts to be, that on said November 8th, 1875, defendant paid to the holder of bond 78, sued on herein, the sum of $290.00 on said bond, and on no other bond sued on herein; that the whole of said sum of $290 was then and there credited and endorsed on said bond 78, & was and is a part payment on said bond 78, and on no other bond sued on herein, as plaintiff then well knew; that said bond 78 now bears said endorsement of $290.00, as before stated, and defendant asks that said bond 78 be brought into court for inspection by this defendant.

5th. Defendant avers & says that there was due on said bond 78 at the date of the commencement of this suit $434.00, which am'nt defendant brought into court at the date of the filing of its answer, May 1st, 1881, and tendered to pl't'ff, and which it has ever since been ready & willing to pay, & now here brings said sum into court

& offers to pay the same to pl't'ff, & tenders & offers to pay the same to plaintiff in full payment of said bond 78.

6th. Further answering said declaration, and the amended declaration, and the amendment to the amended declaration, this defendant avers that the facts set forth therein do not constitute a cause of action against this defendant; that more than five years have elapsed since the maturity of the bonds sued on herein, (except as to bond 78, as hereinbefore set forth,) and the bringing of this suit, and said bonds, & each of them, are barred by the statutes of limitations of the State of Kansas.

7th. Defendant denies that it ever acknowledged or recognized the plaintiff's bonds sued on herein as a subsisting obligation, as alleged in the amendment to his petition, filed herein Jan'y 22, 1881, and as alleged in the second amendment to said petition filed herein November 28th, 1881; and further denies that the alleged circular set out and mentioned in said amendments ever was sent to said plaintiff by said city, or by its city clerk, or any other of the officers of defendant, and denies that plaintiff ever received such circular from said city or from any other party on behalf of said city.

Wherefore defendant demands judgment for its costs.

J. D. McCLEVERTY & J. H. SALLEE,
Att'ys for Deft.

UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

J. H. SALLE, being first duly sworn on his oath, deposes and says:

28 I am one of the attorneys of the defendant herein.

Affiant further says that, the defenses numbered two (2), four (4), and (7), set forth herein are true, as he verily believes.

J. H. SALLEE.

Subscribed in my presence and sworn to before me, this 15th day of June, 1883.

A. S. THOMAS, *Clerk.*
By FRANK J. THOMAS, *Deputy.*

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Answer. Filed June 15, 1883. A. S. Thomas, clerk. By Frank J. Thomas, deputy. J. D. McCleverty & J. H. Sallee, att'ys for def't.

In the Circuit Court of the United States, District of Kansas.

S. G. HICKMAN
vs.
THE CITY OF FORT SCOTT.

The pl'ff for reply to this answer of def't of June 15, denies each and every allegation therein contained.

BROWN & ARMSTRONG,
Pl'ff's Att'ys.

Endorsed: 3139. Hickman *vs.* Fort Scott. Reply. Filed June 15, 1883. A. S. Thomas, clerk. By Frank J. Thomas, deputy.

29 *Stipulation Waiving a Jury.*

In the Circuit Court of the United States for the District of Kansas.

SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT. } No. 3139.

The parties to this action hereby waive the intervention of a jury, and agree that this action may be tried by the court.

S. E. BROWN, E. F. WARE,
Attorneys for Plaintiff.
J. H. SALLEE & J. D. McCLEVERTY,
Attorneys for Defendant.

Endorsed: No. 3139. Sam'l G. Hickman *vs.* The City of Fort Scott. Stipulation waiving jury. Filed Nov. 30, 1883. A. S. Thomas, clerk.

30 UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, 1883, proceedings were had, and appear of record, in words and figures following to wit:

SATURDAY, *December* 1, 1883.

31 In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'ff,
vs.
THE CITY OF FORT SCOTT, KANSAS, Def't. } 3139.

Now, on this day this cause came on for hearing and trial by the court, a jury being waived by stipulation in writing filed herein.

The plaintiff appeared by S. E. Brown and E. F. Ware, his attorneys, and the defendant by its attoneys, J. H. Sallee and J. D. McCleverty, and the court having heard the evidence and arguments of counsel, and being fully advised in the premises, finds as follows, to wit:

1st. This suit is brought on certain bonds of the city of Fort Scott, Kansas, known as "special improvements bonds," a copy of one numbered fifteen, being one of those sued upon, is set out in full in plaintiff's original petition herein, all of the bonds sued on being similar in tenor and effect to said bond 15, except that a portion of them became due July 1st, 1873, and a portion due July 1st, 1874, by the terms of said bonds.

2nd. All of said bonds sued on were issued under date of July 1st, 1871, and those numbered 6, 7, 8, 9, 24, 55, 56, 57, 58, 79, and 80 became due by their terms on July 1st, 1873, the interest on which

was represented by two annual coupons of fifty dollars each; all of which coupons were paid on and prior to said July 1st, 1873, and no payments upon either the principal of the bonds mentioned in this finding has been made since said July 1st, 1873, except as stated in finding number four hereinafter.

3rd. That of the bonds sued on herein, those numbered 10, 11, 12, 13, 15, 17, 63, 64, 65, 66, 67, 68, 69, 70, and 71 became due by their terms on July 1st, 1874, the interest on which was represented by three annual coupons of $50.00 each, all of which coupons, except upon bonds numbered 10, 11, 12, 13, 15, and 17, became
32 due, and were paid on and prior to said July 1st, 1874, and the coupons on said bonds 10, 11, 12, 13, 15, and 17 were paid on and prior to May 16th, 1875, and no payments were made upon either the principal or interest of the bonds in this finding mentioned after said May 16th, 1875, except as stated in finding number four hereinafter.

4th. The court further finds that as to the remaining bond sued on herein, being bond number 78, that it became due by its terms July 1st, 1873, and on and prior to that date all the interest coupons thereon had been paid; that on November 8th, 1875, a payment was made on said bond number 78 of the sum of $290.00, and the balance of said bond remained due and unpaid at the time of the commencement [of] this action; that said payment upon bond 78 was made by Donnell, Lawson & Co., fiscal agents of the State of Kansas, upon the authority of certain letters sent them by J. H. Randolph, city treasurer of the defendant, written by him in the usual routine of his official duties, but without any special instruction or knowledge on the part of the city council of said city; which said letters are as follows, to wit:

"FORT SCOTT, Ks., *June* 10, 1875.

"Mess. DONNELL, LAWSON & Co. *New York.*

"DEAR SIR: Yours of 2nd inst. at hand. The coupons of our special improvement bonds are all retired except bonds No. 97 & 107 to 113; the last coupon on these Nos. (all past due) is not yet in; will give you statement of am't & Nos. of these bonds due & unpaid by next mail. You may redeem any one of these bonds whenever this fund in your hand is sufficient to do so. My remittance of May 26th of $245.00 was all to apply on coupons of bonds issued to the M., K. & T. R.R. Co., & not $70.00 of it for special im. fund, as you state you have credited in your letter of June 1st. The Nos. of the bonds to which these coupons belong are 1 to 7, inclusive.
You will please make the transfer of the $70.00 to your Fort
33 Scott City coupon acc't. About what would our city funding bonds bring in your market, bonds running 10 years, int. payable S. A. at 10 per cent. p'r annum.

"Resp'y, yours, J. H RANDOLPH,
"*City Treasurer.*"

"FORT SCOTT, Ks., *Aug. 6th*, 1875.

"Mess. DONNELL, LAWSON & Co., *New York.*

"GENTLEMEN: I give you below the Nos. of our special improve-

ment bonds now unpaid. Nos. 6 to 15, 17 to 22, 24, 30 to 39, 53 to 58, 60 to 80, 83 to 85, 97, 98, 99, & 104 to 115, in all 70 bonds of $500.00 each, all past due. I will be in New York last of this month, & will call and explain to you the situation in regard to these bonds, so you may understand the reason why they are not paid, and that owners of the same may govern themselves accordingly.

"Very resp'y yours, J. H. RANDOLPH,
"*City Treasurer.*"

"FORT SCOTT, KS., *Aug. 11th*, 1875.

"MESS. DONNELL, LAWSON & CO., *New York.*

"GENTLEMEN: I enclose you herewith d'ft for $500.00 to apply on interest due on Fort Scott city special improvement bonds.

"If not convenient to apply on interest use to pay on bonds.

"Resp'y yours, J. H. RANDOLPH."

On November 8th, 1875, said fiscal agents paid bond 77 of this series, and said $290.00 on said bond 78, they being the only bonds presented to that date, which payments exhausted the funds in the hands of said fiscal agents. That the official accounts of the treasurer of said city contain the following entry of credit to himself: "August 11th, 1878. By Donnell, Lawson & Co., to pay interest on special improvement bonds, $500.00," which was the monies remitted by said treasurer in the letter of August 11th, 1878. Said payments were reported by the city treasurer in his an-
34 nual report and approved by the city council.

5th. The court further finds that in July, 1878, the defendant, the city of Fort Scott, Kansas, by its city council, referred the matter of its financial condition to th: finance committee of said council, which committee made a report in writing to said council on the 21st day of August, 1878, which report was duly adopted and spread in full on the records of the minutes of said council, and is as follows, to wit:

"Council Proceedings, August 21st, 1878.

"Adjourned regular meeting.

"Mayor Cohen in the chair.

"The report of the finance committee on the matter of the city indebtedness was read, and on motion adopted and ordered placed on file. It is as follows:

"To the Hon. Mayor and Councilmen of the city of Fort Scott, Kansas:

"We, your committee on city indebtedness, met with and consulted B. P. McDonald, D. P. Lowe, J. S. McCord, J. D. McCleverty, and also J. D. Hill, W. J. Bowden, W. A. Cormany, members of the board of education of this city, whom the committee thought should be invited, and after careful consideration the joint committee unanimously agreed on the plan of compromise set forth in the following circular letter, which we recommend be sent to each person holding

city and school district bonds, except Macadam bonds, about which latter we make no report:"

"CITY CLERK'S OFFICE, FORT SCOTT, KANSAS, *Sept. 3d*, 1878.

DEAR SIR: The city council of Fort Scott address this to each person holding bonds of the city of Fort Scott, Kansas, with a view to bring about such an amicable adjustment of the indebtedness of our city, if possible, as will be fair to the bond-holders in view of our circumstances, and at the same time be such an one as the city can reasonably expect to be able to meet.

Nearly all of our county, city, and school district indebtedness was incurred at or about the year 1870, which was what would be
35 called our times flush, when money was plenty, and property of ready sale at good figures. In 1870 the assessed valuation of all kinds of property in the city was $1,445,730, as shown by the tax roll, while our assessed valuation for the year 1878 is only $814,457, being a decline in valuation of $631,270, or nearly one-half, a decline which cannot be accounted for upon the basis of the general decline in values, but is doubtless largely attributable to the excessive burden of our debt and taxation. For the year just past our levy for all funds in the city was 5.25 per cent., while this year, had an adequate levy been made, it would have been nearly 7 per cent., and this, too, without making any levy for sinking fund purposes to meet our railroad bonded indebtedness. A careful examination of our financial condition convinced us that to meet our indebtedness in its present form, including our share of the county and school district indebtedness, would, within two or three years, require a levy of ten per cent., and should the extreme decline in our assessed valuation continue, the rate would exceed that figure.

Our assessed valuation of all kinds of property in the city, beginning with the year 1870, as shown by the tax roll, is as follows:

1870	$1,445,730
1871	1,421,682
1872	1,382,950
1873	1,233,624
1874	1,386,294
1875	1,071,834
1876	958,896
1877	904,368
1878	814,457

The increase in valuation in 1874 is explained by the fact that nearly 250 acres of outlying additions were that year annexed
36 to the city. In the face of this great decline in value, our indebtedness is rapidly maturing and is yet to be provided for. The indebtedness of our county in railroad bonds is $300,000, of which $150,000 are in litigation, and upon which there is nearly $40,000 of an accumulation of unpaid interest, and all may yet be adjudged a valid indebtedness. The assessed valuation of the county, including the city, this year is $3,509,164; the valuation of the city being about one-fourth of that, places one-fourth of the

county's burden upon the city. A statement of our indebtedness, then, upon that basis, is as follows:

One-fourth co. debt	$85,000
City railroad debt	100,000
City school district bonds	37,500
City bridge and funding bonds	41,500
City special improvement bond and accrued interest	45,000
Other sundry indebtedness about	6,000
Total	$315,000

From this statement it will be seen that the ratio of our total indebtedness to our assessed valuation is about 40 per cent.

Of our indebtedness our school district, bridge, and funding bonds bear ten per cent. interest, and for these the city has had something in the shape of value received. In the matter of our railroad 7 per cent. bonds, however, both county and city, the universal sentiment of our people is that we have not been rightly treated. Each of the railroad companies promised that their machine shops should be built and located in Fort Scott, the M., K. & T. made a written contract to that effect, and the city railroad debt of $100,000 and a county railroad debt of $150,000 was created. The bonds were delivered, but the railroad companies have built their shops elsewhere. The M., K. & T. Railroad, after receiving $100,000 of city and $150,000 of county bonds, not only failed to comply with
37 its contract, but started a new town, built its machine shops there, and has since lent every effort of its great power to foster a rival town within fifty miles of this place.

Had the railroads companies fulfilled their pledges, Fort Scott nor Bourbon county would not now be asking leniency at the hands of their creditors, our debts would not have been out of proportion to our valuation, our people would have been satisfied, our town and county prosperous.

We have incurred the debt, we have failed to receive the benefits. Both of the railroad companies are bankrupt, and we are without remedy or hope of redress.

A strong sentiment has always existed in favor of utterly repudiating our railroad debt, and now that the time approaches for levying a sinking fund tax to pay that debt, this sentiment increases. The present bondholders may be blameless as to the bad faith of the railroad companies, but the result to us is all the same, and our debt burden in no wise relieved by that fact.

Our inability to pay such a debt seems apparent, and soon or later we know that we must fail. An increase in taxation means a decrease in value, the refusal of the tax-payer to pay, the driving out of capital already invested, and the turning away of those who would otherwise settle here. Realizing this, we have this year omitted to make a levy for debt purposes, either principal or interest, and hope by a statement of the facts and of our circumstances, together with the safeguards which we propose for the future, to effect

a compromise, which, while burdensome still to us, yet we know we can meet, and at the same time give to the bondholder as high a marketable value as he now has in the paper he now holds. We feel, however, that a difference ought to be made in the two classes of bonds, and hence we propose to refund the city and school district debt upon the following terms: The city, railroad, and machine
38 shop 7 per cent. bonds to be refunded at 50 cts. on the dollar into a 30-year 5 per cent. bond, payable at any time after 10 years, and the school district funding and bridge 10 per cent. bonds to be refunded into a like bond at the rate of 75 cts. on the dollar of the present amount of bonds outstanding. This would make the amount of our city and school district debt about 20 per cent. of our valuation, leaving out of consideration our proportion of the county indebtedness, which, if considered, would still leave our debt about 30 per cent. of the valuation.

To effect this compromise we will need new legislation, and in obtaining this, we propose and suggest the following provisions of law as a protection to the holders of the compromise bonds against a subsequent over-issue, which might compel a new compromise, to wit:

A tax levy for interest to be made annually sufficient to pay the interest then due. At the end of ten years one-twentieth or 5 per cent. of the principal to be collected, and for each year thereafter, until the whole refunded debt is paid or liquidated.

Making any officer who shall prevent such levy personally liable to any bondholder for the amount then due, to be recovered in a civil action; making it a misdemeanor punishable by fine and imprisonment for any officer to divert any portion of the funds so collected to any other purpose than the payment of these bonds and interest, the fine to be not less than the sum so diverted.

Making a provision that the aggregate amount of our bonded indebtedness when the now proposed compromise is effected shall never be exceeded until the entire amount of the compromise bonds shall be fully paid, and making any bonds that might be issued in excess of that amount absolutely null and void.

The bonds issued under such a law as this would be abso-
39 lutely protected against an over-issue in the future, and with this safeguard would sell in the aggregate for more dollars and cents than the entire amount of our present bonded indebtedness.

In response to this, we ask each bondholder to express his views fully, stating the amount and kind of bonds he holds; and we sincerely hope that a compromise can be fully agreed upon by the time our Legislature meets in January next, so that the proper legislation may be obtained, and the refunding bonds issued in time for the making of a levy in 1879.

By order of the city council of the city of Fort Scott, September 3rd 1878.

——— ———, *City Clerk.*"

At said meeting of August 21st, 1878, said city council also adopted the following motion, as appears by said records:

"On motion, the city clerk was instructed to have one hundred copies printed of the circular letter, with the report of the finance committee on our indebtedness, as the city attorney may direct, to be sent to the holders of our city bonds."

6th. That under date of September 3rd, 1878, the city clerk of said city caused to be printed one hundred copies of said circular letter, each being printed with a dotted head-line in which to write the name of the person addressed, and sent a copy of the same to each of the holders of the bonds of said city, except to the holders of said special improvement or macadam bonds, but did not send said circular to this plaintiff, nor to any agent or representative of his, nor to any other holder of said special improvement or Macadam bonds.

The reason why said city clerk did not send any of said circulars to any of the holders of said special improvement or macadam bonds was because of the directions to that effect, made in the adopted report of the finance committee of said city council, as set forth in finding No. 5 herein. Each of the circulars so sent out by said city clerk were signed by him in writing, and had the name of the person to whom sent written in the dotted head-line thereof. Some persons holding bonds of said city, other than said special improvement or macadam bonds, did receive copies of said circular in which no name was written in said dotted head-line, but were signed by said city clerk.

7th. That in 1878, and after September 3rd, one Thomas W. Marshall, of Westchester, Pa., where plaintiff resided, who held some of the bonds of said city other than said special improvement or macadam bonds, received one of said circulars, which he showed to plaintiff, which was signed by said city clerk in writing, over the words city clerk at the end, and one H. Burkhalter, at Westchester, Pa., who also held some of the bonds of said city other than said special improvement or macadam bonds, received one of said circulars in 1878, which he gave to plaintiff. Said circular was also received by other persons residing at Westchester, Pa., who held bonds of said city other than said special improvement or macadam bonds.

8th. That the class of bonds sued on herein are described on their face as "special improvement bonds," but were commonly called "macadam bonds" by the holders thereof, and by the officers of said city, and were isssued by said city in payment for macadamizing certain streets in said city.

9th. The plaintiff is a citizen of Westchester, Pa., and the defendant is a city of the second class, organized under the general laws of Kansas, and a citizen thereof.

On the foregoing findings and conclusions of fact, the court finds as matters of law that the plaintiff is entitled to recover upon the bonds sued on in the amount of $26,385.23, and for judgment accordingly, the judgment to bear interest at ten per cent.

It is therefore now by the court here considered, ordered, and

adjudged that said plaintiff, Samuel G. Hickman, have and recover of and from said defendant, the city of Fort Scott, the sum
41 of twenty-six thousand three hundred and eighty-five dollars and twenty-three cents, and his costs in this action expended, and that this judgment bear interest at the rate of ten per cent. per annum, to which said conclusions of law and judgment, and to each and every of the same, the defendant thereupon duly excepted and excepts.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Journal entry for Dec. 1, 1883. Brown for pl'ff, McCleverty for def't.

42

Motion for New Trial.

In the Circuit Court of the United States, District of Kansas.

SAMUEL G. HICKMAN, Pl'tiff,

vs.

THE CITY OF FORT SCOTT, Def't.

Now comes defendant, by its attorneys, and moves the court to set aside and vacate the decision and judgment of the court herein and grant a new trial of this action, and as grounds for this motion, says:

1st. The decision and judgment is not sustained by sufficient evidence, and is contrary to law.

2nd. Error of law occurring at the trial, and excepted to at the time by the defendant.

3rd. Judgment was rendered for plaintiff, when it should have been rendered for the defendant.

J. D. McCLEVERTY &
J. H. SALLEE,
Att'ys for Def't.

Endorsed: No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott. Motion for a new trial. Filed Dec. 1, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy. J. D. McCleverty & J. H. Sallee, att'ys for def't.

43

Title.

SAMUEL G. HICKMAN
vs.
THE CITY OF FORT SCOTT. } No. 3139.

The defendant's motion for a new trial herein came on to be heard, and was argued by counsel, on consideration whereof the court overrules said motion for a new trial.

To which said ruling and decision the defendant duly excepted and excepts, and by consent of parties, in open court, a supersedeas bond is waived, and stay of proceedings, by like consent, herein is ordered until decision of Supreme Court, upon condition that this action be submitted to the Supreme Court of the United States, under rule 20, and the bond on error is fixed at $500.00.

44 Supreme Court of the United States.

SAMUEL G. HICKMAN, Plaintiff,
vs.
THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS, Defendant.

Know all men by these presents, that we, The City of Fort Scott, Kansas, and E. J. Peck, and John Glunz, all of Fort Scott, State of Kansas, are held and firmly bound unto Samuel G. Hickman, of Westchester, State of Pennsylvania, in the sum of five hundred dollars, to be paid to the said Samuel G. Hickman, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 18th day of January, A. D. 1884.

Whereas the above named, The City of Fort Scott, Kansas, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States, sitting in and for the district and State of Kansas:

Now, therefore, the condition of this obligation is such, that if the above named The City of Fort Scott, Kansas, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

Executed by The City of Fort Scott, Kansas, by its mayor and city clerk.

U. B. PEARSALL, [L. S.]
Mayor of Fort Scott.
E. J. PECK. [SEAL.]
JNO. GLUNZ. [SEAL.]

Attest:
[SEAL.] S. S. DAVIS, *City Clerk.*

STATE OF KANSAS, }
Bourbon County, } *ss:*

We, E. J. Peck and John Glunz, both residents of Bourbon county, Kansas, being duly sworn on oath, depose and say, we are each worth the sum of $500, over and above all our debts, liabilities, & exemptions.

E. J. PECK.
JNO. GLUNZ.

Subscribed in my presence and sworn to before me, this 18th day of Jan'y, 1884.

[SEAL.] S. S. DAVIS,
Notary Public.

My commission expires July 17, 1886.

The above bond is hereby approved.
Jan'y 22, 1884. C. G. FOSTER, *Judge.*

[Endorsed:] No. 3139. Samuel G. Hickman *vs.* The City of Fort Scott, Kansas. Bond. Filed Jan. 22, 1884. A. S. Thomas, clerk.

45 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy and transcript of so much of the record and papers of said court in the action of Samuel G. Hickman *vs.* The City of Fort Scott, No. 3139 in said court, as shows the pleadings in the case upon which said action was tried; also the findings and judgment as entered at the trial thereof, and exceptions thereto, the motion for new trial, the entry overruling the same, and the exceptions thereto.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 11th day of January, A. D. 1884.

[SEAL.]

A. S. THOMAS, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Samuel G. Hickman, plaintiff, and The City of Fort Scott, Kansas, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment by therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, chief justice of the Supreme Court of the United States of America, this 11th day of January, A. D. 1884.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

[Endorsed:] No. 3139. The City of Fort Scott, plaintiff in error, *vs.* Samuel G. Hickman, defendant in error. Writ of error. Filed Jan. 11, 1884. A. S. Thomas, clerk.

47 THE UNITED STATES OF AMERICA, *ss:*

To Samuel G. Hickman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein the City of Fort Scott, Kansas, is plaintiff in error and you are defendant in error, to show good cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error *as in said writ of error* mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 22 day of Jan., in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] C. G. FOSTER,
U. S. Dist. Judge.

FORT SCOTT, KANSAS, *Jan'y 28th*, 1884.

On behalf of said Samuel G. Hickman, I hereby acknowledge service of the above and foregoing citation, by the receipt of a true copy thereof this day served on me by J. H. Sallee, one of the att'ys for said The City of Fort Scott, Kansas.

E. F. WARE,
An Att'y for Hickman.

[Endorsed:] No. —. The City of Fort Scott, Kansas, plaintiff in error, *vs.* Samuel G. Hickman, defendant in error. Citation.

Endorsed on cover: No. 846. Kansas C. C. U. S. The City of Fort Scott, plaintiff in error, *vs.* Samuel G. Hickman. Filed 13th May, 1884.

112-130

Office Supreme Court U. S.
FILED
AUG 28 1884
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CITY OF FORT SCOTT,
IN THE STATE OF KANSAS, *Plaintiff in Error.*
vs.
SAMUEL G. HICKMAN, *Defendant in Error.*

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

J. D. McCLEVERTY,
FORT SCOTT, KANSAS,
Atty. for Plff. in Error.

S. E. BROWN,
115 BROADWAY, N. Y.,
Atty. for Deft. in Error.

Banner Publishing Company, Printers, Fort Scott, Kansas.

was defending upon the theory that it did not owe the bonds, but was only bound to the liability of levying, collecting and paying over to the bondholders the special assessments provided for by the laws of Kansas. This court held the city generally liable, thus reversing the decision of the lower court. The present defendant in error was probably waiting quietly for a decision in that case, but did not begin this case until July 1st, 1880, at which date all of his bonds sued on herein were barred by the five years Statute of Limitation of Kansas, Gen. St. of Kansas of 1868, p. 633, first subdivision of Sec. 18, unless the bar was removed as he claimed and hereinafter stated.

While the case of the Concord Savings Bank was still pending and undecided, and while the city of Fort Scott still held that it was not liable for the payment of this class of bonds, it issued the circular set out in the findings—pp. 29, 30–31. The committee which reported this circular to the city council of Fort Scott, recommended that the circular be sent to all the creditors of the city except holders of these Special Improvement or Macadam Bonds, such as are sued on in this case—p. 28. This report and recommendation was adopted,—findings, p. 28,—and the city clerk was instructed to have them printed and issue them—findings, p. 32. The city clerk accordingly had one hundred of the circulars printed and sent them "to each of the holders of the bonds of said city except to the holders of said Special Improvement or Macadam Bonds, but did not send said circular to this plaintiff, (defendant in error,) nor to any agent or representative of his, nor to any other holder of said Special Improvement or Macadam Bonds,"—finding No. 6, p. 32.

Upon this circular defendant in error relied, as an acknowledgment within the terms of Sec. 24, p. 634, Gen. Stat. of Kansas of 1868, which avoided the bar of the statute, and by way of amendment set out said circular in his petition,—pp. 14, 15, 16, 17 and 21. The court before whom the case was tried so found, holding substantially that said circular having been spread in

full upon the minutes of the proceedings of said city council, amounted to such an acknowledgment; although, in fact, none of the circulars were sent to the plaintiff, (defendant in error,) nor to any other holder of the class of bonds sued on.

The state of the pleadings is as follows: July 1st, 1880, plaintiff filed his petition, being an ordinary action on the bonds—pp. 1 to 12.

July 28th, 1880, defendant filed general demurrer, the real point being that the bonds were barred by the Statute of Limitations—p. 13.

November 26, 1880, demurrer was sustained—p. 13.

January 22, 1881, plaintiff amends petition, setting up circular and alleging that it was sent to plaintiff, but failed to allege that it was signed by or on behalf of defendant; and also alleging (p. 14) that on Nov. 8, 1875, the city had paid $290.00 on said bonds—pp. 14 to 17.

May 18, 1881, defendant filed answer to the 9th count of petition, alleging that said $290.00 was paid upon bond No. 78, the one set up in that count, and admitting that the balance of said bond 78 was due and tendered the amount thereof—p. 18.

May 18, 1881, defendant filed general demurrer to all of amended petition except said 9th count—pp. 18–19.

June 25, 1881, demurrer was sustained—pp. 18 to 21.

November 28, 1881, plaintiff filed a second amendment to this petition, alleging that the circular set up in first amendment was signed for the city by its city clerk, and also that the city, on July 1, 1875, had made a payment of interest upon each of the bonds sued on—p. 21.

June 15, 1883, defendant filed verified answer, denying the payments alleged in the petition as amended, admitting the payment of the $290.00 being made on bond No. 78 on Nov. 8, 1875, and that $434.00 was still due thereon, the tender of which was renewed, setting up the five years Statute of Limitations, and deny-

ing the acknowledgment set up by plaintiff in avoidance of the statute—pp. 24–25.

June 15, 1883, plaintiff filed general denial in reply—p. 25.

November 26, 1883, jury was waived, and trial had by the court, which made special findings of the facts, (pp. 26 to 32,) and upon these findings rendered judgment for the full amount claimed, (pp. 32–33.) Defendant excepted to the judgment, (p. 33,) filed a motion for new trial, (p. 33,) which was denied, (p. 33,) to which ruling defendant also excepted, (p. 33,) and brings the case here for review upon the pleadings, findings of fact and judgment.

The points of error are:

I. That the judgment is contrary to law, and ought to have been rendered for the defendant below.

II. That the findings of fact do not sustain the conclusions of law and judgment.

ARGUMENT.

The only question in this case is whether any acknowledgment in writing has been made to Samuel G. Hickman, defendant in error, sufficient to avoid the bar of the Statute of Limitations within the terms of Sec. 24, p. 634, Gen. St. of Kansas of 1868, which reads as follows:

"Sec. 24. In any case founded on contract, when any part of the principal or interest shall have been paid, or any acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

The Supreme Court of Kansas has given this statute a very broad and liberal construction, and in Elder vs. Dyer, 26 Kan., 604, has declared in substance that any acknowledgment which admits an existing liability is sufficient, and that there is no ne-

cessity that there should be a promise of payment, either express or implied.

Of course I understand well enough that this court will hold itself bound to construe and enforce this statute in accordance with the construction given to it by the State Supreme Court, and hence I shall say but little upon the question of what language will amount to an admission. The real point in this case is whether any acknowledgment of any kind was ever made *to* Samuel G. Hickman, *or to any one for him*, even if it be conceded for arguments sake that the circular letter which is set out in full in finding No. 5, would have been an acknowledgment in law if sent *to him* by or on behalf of the city.

That such an acknowledgment, to be binding and of any force, must be made *to the creditor*, and that no acknowledgment however strong, if made *to a third person*, can be of any avail to a creditor, has been repeatedly decided by the Supreme Court of Kansas.

In Sibert vs. Wilder, 16 Kan., 176, is a case where Sibert sued Wilder upon a promissory note, in which he relied upon an affidavit filed by Wilder in another case, to which Sibert was not a party, as a garnishee, in which Wilder said: (p.180) "*There was due and owing on said note* (the one sued on,) on the 25th day of March, 1868, when notice of garnisheement in this and other cases was served, the amount of said note as above stated less the $250.00. *Said note is still outstanding and unpaid* except that I claim an offset on a certificate of deposit * * * for $300.00." * * *

This affidavit was signed and sworn to by said Wilder, and Sibert attached a copy of it to his petition. It was certainly an unequivocal and full admission that the note sued on was an existing liability, and that the full amount less certain specific offsets, was due. As to this, the court says: (p.180) "That it is not the admission of a present and subsisting debt which the party is liable for and willing to pay, and that it *was not made to the*

creditor, or to any one acting for him, but to an entire stranger. As the record appears before us, we think *the last point well taken*; and without considering the others, upon *that* decide the case. All that can be gathered from the record is, that this acknowledgment was made in an answer returned by Wilder as garnishee in an action brought against the assignor of the plaintiff. It was not therefore made to this plaintiff, or his assignor, or to any one acting for him, but to a party claiming adversely to such assignor. *Is such an acknowledgment within the statute?* We think not. It may be conceded that at one time the decisions of the courts were in favor of such a construction, (quoting decisions,) but these rulings grew out of the fact that the Statute of Limitations was regarded as a statute of presumptions rather than as one of repose. It is well said in 3 Parsons on Con., 5th Ed., p. 63: 'A very little observation will show that these two views lead to results which are not only distinctly different, but antagonistic. This difference may be stated theoretically thus: If the Statute of Limitations be a statute of presumptions, then it is taken away by whatever will rebut the presumption, and this is anything which implies or amounts to an acknowledgment that the debt still exists; but if it be a statute of repose, then it remains in force unless the debtor renounces its benefit or protection, and voluntarily makes a new promise to pay the old debt.' It is perhaps needless to add that the latter is to-day the accepted view. Under that view it is held that an acknowledgment *to a mere stranger will not avoid* the running of the statute. The acknowledgment of a debt, to take a case out of the Statute of Limitations, *must be made not to a mere stranger*, but to the creditor, or to some one acting for him, and upon which the creditor is to act or confide."

Again, in Schmucker vs. Sibert, 18 Kan., on p. 108, the court says: "Still again, *it is settled* by the decision of this court, that the answer in the garnishee proceedings, though in some sense an acknowledgment of the debt, yet being one made *to a mere*

stranger, and *not to the creditor*, or to any one acting for or representing him, *does not avoid* the bar of the statute." Referring to the above case in 16 Kan.—These opinions, it might be remarked, were rendered by Judge Brewer, who since the trial of this case has been appointed judge for that circuit.

Again, in Clawson vs. McCune, 20 Kan., on p. 342, the court says: "Now no acknowledgment or promise was made in the present case that would take the case out of the operation of the statute. For while the administrator and administratrix may have orally acknowledged the debt against the estate, and may have made such an acknowledgment in writing, and may even have signed the same, yet neither of them ever made *to the holder* of the claim any such acknowledgment or promise in writing; and therefore they did not, by any acknowledgment which they may have made, suspend the running of the Statute of Limitations. (Sibert vs. Wilder, 16 Kan., 176; Hanson vs. Towle, 19 Kan., 273.) The acknowledgments and promises which they did make were either not made in writing, or not signed by them, or by the party to be charged, or not made *to the holder of the claim or to any agent of his*."

These cases settle the construction of this statute, and will probably be considered binding upon the federal courts. The Supreme Court of Kansas, however, in these decisions is fully in accord with the great weight of authority. Such an acknowledgment, to be binding, amounts really to a contract; that is, it is in effect a contract to revive a stale and dead contract. No contract can be made unless by proper parties. In a transaction between Jones and Brown, a third party, Smith, cannot come in and claim that what Jones said to Brown would also enure to his, Smith's benefit. The presumption is that what Jones said to Brown was meant solely for Brown's benefit, and hence the rule that an acknowledgment to a mere stranger is of

no avail, but must be to the party himself or to his representative.

2 Story's Eq., Sec. 1521 a.
Bloodgood vs. Brewer, 4 Selden, 362.
Wakeman vs. Sherman, 5 Selden, 85.
Taylor vs. Hendrie, 8 Nev., 243; 5 Nev., 206.
F. & M. Bank vs. Wilson, 10 Watts, 261.
Christy vs. Flemmington, 10 Pa. St., 129.
Kyle vs. Wells, 17 Pa. St., 286.
Rings vs. Brooks, 26 Ark., 540.
Roscoe vs. Hale, 7 Gray, 275.
Keener vs. Crull, 19 Ill., 190.
Farrell vs. Palmer, 36 Cal., 187.
Georgia Ins. Co. vs. Elliott, Taney 130.
Katz vs. Moessinger, 7 Ill. App., 536.
Allen vs. Coller, 70 Mo., 138.
Niblack vs. Goodman, 67 Ind., 174.
Feessen vs. Camblin, 1 Ill. App., 424.
Wachter vs. Albee, 80 Ill., 47.
McGrew vs. Forsyth, 80 Ill., 596.
Parker vs. Shuford, 76 N. C., 219.
Faison vs. Bowden, 76 N. C., 425.
McKinney vs. Snyder, 78 Pa. St., 497.
Trousdale vs. Anderson, 9 Bush, (Ky.) 276.

This being the settled rule of law, what then does this record show as to this matter of acknowledgment? The 5th, 6th and 7th findings contain all the facts upon this point.

The 5th finding sets forth the report of the finance committee of the city council, together with the circular letter above referred to, concerning which the report says: (finding 5, p. 28,) "The joint committee unanimously agreed on the plan of compromise set forth in the following circular letter, which we recommend be sent to each person holding city and school district bonds, *except macadam bonds*, about which latter we make no report."

This report was adopted—p. 28. Then follows the circular letter, which is set out verbatim, showing the dotted head-line in which was to be written the name of the person to whom it might be sent, and commencing with the words "Dear Sir." Also ending with a ruled line preceding the words "City Clerk," showing where the city clerk should sign each one sent out by him.

Finding No. 6 shows that the city clerk had one hundred of these circular letters printed, and that he "sent a copy of the same to each of the holders of the bonds of said city *except to the holders of said Special Improvement or Macadam Bonds, but did not send said circular to this plaintiff, nor to any agent or representative of his, nor to any other holder of said Special Improvement or Macadam Bonds.*"

Finding No. 6 also sets forth that "the reason why said city clerk *did not send* any of said circulars to any of the holders of said Special Improvement or Macadam Bonds, was *because of the directions to that effect* made in the adopted report of the finance committee of said city council, as set forth in finding No. 5 herein." Also that each of the circulars sent out by the city clerk usually "had the name of the person to whom sent written in the dotted head-line thereof."

Finding No. 7 sets forth that one T. W. Marshall and one H. Burkhalter, who resided at Westchester, Pa., the place of plaintiff's (defendant in error,) residence, each of whom "held bonds of said city *other than said Special Improvement or Macadam Bonds*," each received one of said circulars, which they showed to plaintiff, and one of whom gave to plaintiff the one he had received, and also other persons in Westchester, Pa., who held bonds of said city other than these Special Improvement or Macadam Bonds, received copies of said circular. That all of the circulars so received were in 1878, and after September 3d.

It might also be mentioned that finding No. 8 shows that although these bonds are described on their face as "Special Improvement Bonds," they were commonly known by the

holders of them and by the city officers as "Macadam Bonds."

Upon these findings of fact I submit that no acknowledgment *to the plaintiff* (defendant in error,) within the rule laid down in these Kansas cases before cited is shown, but that, on the contrary, it is made very plain that the city carefully avoided doing anything which the holders of these "Macadam Bonds" could construe as an admission that it owed the bonds. If any reason were necessary why the city should avoid any such admission of liability, it is found in the fact that the case of United States vs. Fort Scott, 99 U. S., 152, was then pending in this court and undecided, in which the city contended that it did not owe these bonds, but was only bound to assess and pay over the amounts levied upon adjoining property, and that this view was held by the United States Circuit Court for Kansas, by Judge Dillon, then circuit judge.

The report of the finance committee (finding No. 5,) was that this circular should *not be sent* to any holder of "Macadam Bonds." If it was not to be sent to any holder of "Macadam Bonds," then evidently it was not the purpose of the city council to make any acknowledgment to any holder of "Macadam Bonds." The city clerk gets 100 of them printed, as ordered, (p. 32,) but is very careful to send none of them to the plaintiff, (defendant in error,) nor to any other holder of "Macadam Bonds," (findings No. 6, p. 32,) but does send them to holders of other bonds of said city, (finding No. 6,) and no circular was received by any holder of "Macadam Bonds," (finding No. 7.) Just as evidently there was again no purpose on the part of the city or its clerk to make any acknowledgment to any holder of "Macadam Bonds."

If there were any construction necessary in order to show the true meaning of the order to the city clerk (p. 32,) to get this circular printed and send it to the city bondholders, this contemporaneous action on the part of the city clerk, who kept the minutes of the city council, would show what he in fact under-

stood the action of the council to have been. The fact too, that this circular was intended to be sent to certain persons only, is made plain by the fact that it was printed with a dotted head-line in which the name of the person to whom sent was to be written, and the city clerk was to sign his name with a pen at the bottom. Plainly there was the purpose to speak only to certain persons, to make some kind of a distinction, and as the adopted report of the finance committee specified that it be sent to all holders of city bonds except "Macadam Bonds," these general bond-holders were then the specified persons to whom the city directed the clerk to send the circular, and they in fact were the only persons to whom he did send them. Had the city intended anything different, the circular would have been general, and would have been addressed "To all bond-holders of the city of Fort Scott," instead of to a "Dear Sir" by name. Can it fairly be said then that the city spoke to, or made an acknowledgment to, any person other than those to whom it sent this circular? The Circuit Court, in deciding this case, held that as a public corporation can speak only by its record, and as this circular was spread in full upon the records of the city council, that by reason of being so spread upon the records it was thereby addressed to all the world, whether printed and sent out or not, and hence that it made no difference whether the city sent one to Mr. Hickman or not. If this ruling be true to the extent held by the Circuit Court, then a most dangerous rule has been established, since it is equivalent to saying that no matter how old and stale may be the indebtedness of a public corporation, no matter how many years it may have been outlawed, yet if any attempt is made looking to an adjustment, and in doing so that something concerning them is spread upon the minutes, even though accompanied, as in this case, with the statement that "nothing is intended to be said to the holders of these particular bonds," still it is to be construed as an acknowledgment of the full amount claimed upon these stale demands, and the city thereby held.

The particular circumstances under which a thing is done are to be considered always. And it is held that if the circumstances of a supposed acknowledgment show that it was not the intention of the debtor to make an acknowledgment, the running of the statute will not be stayed.

Exeter Bank vs. Sallivan, 6 N. H., 124.
Hancock vs Bliss and others, 7 Wend., 267.
Green vs. Goble, 7 Kan., p. 302.

It nowhere appears that the holder of these bonds ever heard of this record till after this case was commenced.

It cannot be that the ruling of the Circuit Court declares a correct rule of public policy, even though it has the appearance of overcoming a seeming hardship in this particular case. A public corporation must, in the nature of things, have the same right of choosing between its creditors that a private person has, and when the city council of Fort Scott, in its embarrassed situation, referred its financial condition to a committee, and adopted the report of that committee, which recommended the sending of this circular letter to all of its creditors except to the holders of "Macadam Bonds," a recommendation which it followed and carried out, carefully avoiding the Macadam bond-holders all the time, it certainly had the right to make the distinction. It would seem that a correct public policy would demand the same freedom in the transaction of its business affairs to a public corporation as to a private person. If the city as a public corporation, is to be held as speaking by this record, then can it be fairly held as speaking other than in the language of the record? And that language was that the "circular letter * * * be sent to each person holding city and school district bonds *except Macadam Bonds*, about which latter we make no report."

The point is about like this: A debtor becomes embarrassed, having two classes of creditors; to one class, which we will call class A, he feels himself both morally and legally bound, and to these he writes a letter proposing a compromise, but in which

he mentions the amount of claims held by the other class, which we will call class B, but which he does not believe himself to be either legally or morally bound for, but mentions the amount lest he may in the end be held liable in litigation then pending. To the creditors in class B, he does not write at all. Cannot an individual or a corporation make this distinction, and if so will such individual or corporation be bound by this letter to the creditors in class B, to whom nothing was said and no such letter was sent?

The language of the circular itself shows too that it was not intended to be presented or addressed to the holders of "Macadam Bonds," since not one word is said about them except to mention the amount of them, while as to every other class of bonds mentioned in the circular a distinctive proposition is made, and the merits of each class of bonds except "Macadam Bonds" is discussed.

Certainly there is no such plain acknowledgment as was made by Wilder in Wilder vs. Sibert, before cited, for in that case Wilder not only admitted his indebtedness, but swore to it, and yet because it was not made *to the creditor or his representative*, it was held that he could not be charged.

So too it has been held that an acknowledgment found after the death of a creditor among his papers, though signed by him, is not sufficient.

Allen vs. Collier, 70 Mo., 138.
Merriam vs. Leonard, 6 Cush., 150.
Green vs. Goble, 7 Kan., p. 302.

Hence had the city council, the day after it adopted this report of its financial committee, rescinded its action and done nothing further, it could not be claimed that any acknowledgment was made to any one. If this be so, then no acknowledgment could or would be made to the holders of Macadam Bonds so long as they were excepted from the number of those to whom the city spoke or addressed itself.

That some courts have held a party bound by any admission, whether made to the creditor claiming the benefit or to a third person, is undoubtedly true, as is stated in Sibert vs. Wilder, 16 Kan., p. 181, where several such decisions are referred to, but as is stated in that opinion, and in 3 Par. on Con., 5th Ed., p. 63, which the opinion quotes approvingly, those decisions were made at a time when Statutes of Limitations were held to be statutes of presumption, and not as now, statutes of repose. Of course if held to be simply statutes of presumption, then any admission, whether to the party claiming the benefit thereof or to a third party, would overcome this mere presumption. But if they be held to be statutes of repose, then it is necessary, as Parsons says, that the debtor shall *voluntarily* renounce its benefits, and that this can be evidenced only by what is intended as an acknowledgment *to the person* whom he desires to benefit.

That the Supreme Court of Kansas has uniformly held our Statutes of Limitation to be statutes of repose is well settled. In Taylor vs. Miles, 5 Kan., p. 515, after discussing the question at great length the court declares: "It is conceded that Statutes of Limitations are now everywhere upheld; that they are considered favorably as *statutes of repose.*"

This doctrine is again declared in Sibert vs. Wilder, 16 Kan., p. 181, before cited. So, also, in Elder vs. Dyer, 26 Kan., p. 609, the court says: "In this State all Statutes of Limitation are considered as operating only as statutes of repose, and not as presumptions of payment."

2. But this is not all. It will be noticed as before stated, that nothing is said to any Macadam bond-holder in this circular, although distinctive language is addressed to all other bond-holders named in the circular. The only mention made of the Macadam Bonds is the incidental reference to the amount of Special Improvement Bonds outstanding, but there is nothing in the finding to show whether the bonds sued on are the ones mentioned, or whether it refers to some other bonds.

The circular also mentions the amount of the School District Bonds, and the city's share of the county debt, while no further mention is made. Is, however, such an incidental reference a sufficient acknowledgment within our statute? It certainly is no stronger than the letter quoted in Hanson vs. Towle, 19 Kan., p. 281, where the writer says, among other things: "I have not raised money enough at any time to meet your note. * * * If you will have an instrument of writing made that will be satisfactory to you until the money is raised, I will sign it."

Of this language the court says: "Is there in this statement sufficient to avoid the bar of the statute? We think not. A mere reference to the indebtedness, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an 'acknowledgment' as is contemplated by the statute." And while the succeeding sentence of that opinion is explained, and its full import denied in Elder vs. Dyer, 26 Kan., p. 611, yet the portion above quoted is not questioned, and stands to-day as the approved law of the State.

See, also, Barlow vs. Barner, 1 Dill., 418.

3. But does the city council, the governing body of a municipal corporation, have the power to revive a debt already barred? Or is it limited solely to the payment of existing liabilities?

There is nothing in our statute that implies such a power. In Hanson vs. Towle, Admr., 19 Kan., 273, it is held that an administrator has no power to revive a debt barred by the Statute of Limitations. The same line of reasoning would hold that a city corporation has no such power, because in both cases the language of the statute is to govern, and the statute nowhere grants the power. If this be, then even if it should be held that this circular amounted to an acknowledgment within the terms of this statute as to then existing bonds, it would not operate to revive bonds then barred. In finding No. 2, is listed eleven bonds, upon which the last payment was made July 1st, 1873, which was

more than five years prior to the action of the city council when it adopted the report of its finance committee and directed the issuance of this circular, which was on August 21st, 1878, (finding No. 5, p. 28.)

4. It is also held that where an offer is conditional, it must be shown that the condition has been complied with before any benefit can be claimed.

An offer to pay part, accompanied with a tender of a new note for such part, does not avoid the bar.

Smith vs. Eastman, 3 Cush., 355.

Green vs. Goble, 7 Kan., 297.

So an acknowledgment of a debt accompanied with a promise to pay at the end of a year if successful in business, is a conditional promise, and without proof of the fulfillment of the condition would not revive the debt.

Wakeman vs. Sherman, 9 N. Y., 85.

A debtor wrote to his creditor: "You shall have your pay if I live and the whaling business does not fail. Now if you will agree to this I will renew, or else you must do the next best thing," mentioning the note sued on and its amount. The payee did not accept but sued. Held a conditional offer and does not revive.

Munford vs. Freeman, 8 Met., (Mass.) 432.

So in Chambers vs. Ruby, 47 Mo., 99, a debtor wrote his creditors offering a thousand dollars to be distributed among them in settlement of his debts says: "If the proposition is *agreed to* by all parties I will surrender it all." The offer was not accepted but suit was brought. The court held the offer a conditional one and not binding until agreed to.

See also, Barlow vs. Barner, 1 Dill., 418.

Now this circular was, at most, a conditional offer of such an amount as could be agreed to. It says in the last sentence, after inviting correspondence from all to whom it is addressed: "We earnestly hope that a compromise may be fully *agreed upon, etc.*"

Hence, in accordance with these two decisions last quoted, it would be necessary to show that the defendant in error (plaintiff below,) had agreed with the city upon some compromise in accordance with its terms. Probably the reason why the holders of these Macadam Bonds did not correspond with the city was because they themselves well understood that the city was not speaking to them in this circular, and certainly knew very well that none of the circulars were addressed to them. As declared in Pool vs. Relfe, 23 Ala., 701, it ought to be the policy of the law to encourage compromises and settlements, and not to misconstrue the evident purpose and intent of parties, a doctrine which, if applied in this case, must overthrow the ruling of the Circuit Court.

With these views this case is submitted, and if correct, then the Circuit Court erred in rendering judgment upon these findings in favor of the plaintiff below.

J. D. McCLEVERTY,
Atty. for Plff. in Error.

FORT SCOTT, KAN., Aug. 25, 1884.

112-150

FILED
SEP 30 1884
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

THE CITY OF FORT SCOTT, in the State of Kansas,

Plaintiff in Error,

vs.

SAMUEL G. HICKMAN,

Defendant in Error.

In Error to Circuit Court, District of Kansas.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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In the Supreme Court of the United States.

THE CITY OF FORT SCOTT, in the State of Kansas,
Plaintiff in Error,

AGAINST

SAMUEL G. HICKMAN,
Defendanr in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

History of the Case.

The facts of this case are few and easily understood.

Samuel G. Hickman, a citizen of Pennsylvania, purchased and held bonds under the seal of the City of Fort Scott, in the State of Kansas. Some of them matured in 1873, and some in 1874. When they matured the city claimed it had been unfortunate in some railroad subscriptions, and had issued some bonds for which it did not receive the value it expected, and therefore was unable to pay at once, all in full, the bonds he held, although to them no such objection was or could be made. August 6th, 1875, the City Treasurer, the proper financial officer, wrote to the fiscal agents of the city, in New York, an explicit acknowledgment of the indebtedness of the city on the bonds of Mr. Hickman, specifying them by their character and num-

bers. August 11, 1875, the same officer sent $500 of the money of the city "to apply on interest due on Mr. Hickman's bonds," or, "if not convenient to apply on interest," he directed the agents of the city "to use to pay on bonds." The agents accordingly paid it to Mr. Hickman on account of his bonds. It was sufficient to pay the balance due on one bond on which partial payments had theretofore been made, and the balance was applied as a partial payment on another of his bonds, that being the convenient and natural form of receipt, and there being no advantage in Mr. Hickmans sending all his bonds to New York, as there was only $500 then there to be paid. *These payments were reported by the City Treasurer, in his annual report, and approved by the City Council.* They were made within five years of the commencement of this suit, July 1st, 1880, and the Statute of Kansas provides expressly, "In any case founded on contract, when *any part* of the *principal* or *interest* shall have been paid * * * an action may be brought in such case within the period prescribed for the same"—a period of five years —"after such payment."

As if this was not sufficient to induce the holder of the bonds to believe that there was no intention to resist the payment of them, the City Council entered upon its minutes September 3d, 1878, an express admission that Mr. Hickman's bonds constituted a part of the existing indebtedness of the city, and directed its clerk to print, sign and distribute copies of the circular "*to the holders of our city bonds.*" One of these circulars thus authorized, printed and signed, reached the hands of Mr. Hickman shortly after their issue.

In that circular he read a distinct and express acknowledgment that his bonds constituted part of the city's indebtedness, an acknowledgment in writing signed by the proper party made in the most formal and proper manner and with the fullest sanction of the corporation, its own act and deed.

The Statute of Kansas also provides: "In any case founded on contract * * * when any acknowledgment of an existing liability, debt or claim * * * shall have been made, an action may be brought in such case within the period prescribed for the same" —a period of five years—"after such acknowledgment * * * but such acknowledgment * * * must be in writing, signed by the party to be charged thereby."

The city seems to have desired to follow and succeeded in following the exact language of this statute, and when Mr. Hickman received its express acknowledgment of its indebtedness for his bonds in the circular of September 3, 1878, he naturally and properly relied upon it as evidence additional to its payment to him on account August 11, 1875, of the purpose of the city to pay him what was due to him as soon as it was able, or to make a reasonable adjustment with him. He thought, no doubt, a little time and leniency would improve the financial condition of the city; and as he had received both a partial payment of his debt and an express acknowledgment of it, he was under no necessity to press the city unduly for what it could not then pay or harass it with a useless lawsuit.

If he subsequently learned that the city was contesting with another holder of similar bonds, its liability, he knew it was upon grounds affecting the original issue of the bonds, and that the decision in that case would settle the question involved in it for all parties as it did. When, however, that case decided that his bonds were the lawful obligations of the City of Fort Scott, his surprise may be imagined when he was told that he was now to be cheated out of them because he had relied upon their partial payment of them in August, 1875, and upon their express acknowledgment of them in September, 1878, and because he had not vexed them with a useless litigation when they themselves were asking his forbearance on the ground of

their inability to pay him what they expressly acknowledged themselves to owe him. He therefore brought his suit within less than five years of the partial payment to him, and within less than two years of their express acknowledgment of their indebtedness to him.

Notwiahstanding all this, it is gravely contended that Mr. Hickman ought somehow to be cheated out of his bonds, and the statute of limitations is the only pretext which can be offered for doing it. That pretext was not effectual in the Court below where the whole case was heard elaborately and carefully considered and decided. Nor will it be more effectual in this tribunal. To render it effectual it would be necessary to interpolate into the Kansas statute words not there or to deny to the action of the city its proper meaning, and this perversion of law and fact would have for its only object to punish an honest creditor, by confiscating his property, for having listened to the appeals of his debtor so far as to forbear bringing suit so long as the debtor was profuse in his acknowledgment of the debt and of his purpose to pay it or adjust it—all of which forbearance extended over a period less than two years from the date of the last acknowledgment of the debt and the last appeal for forbearance in the adjustment of it. Such a contention would appear to be, alike in a forum of law or of morals, its own sufficient answer.

This action was begun July 1, 1880, and the plaintiff declared solely on the bonds. The Civil Procedure Act of Kansas, permitting the statute of limitations to be raised by demurrer, instead of plea, the defendant demurred and, as of course, the demurrer was sustained at the November Term, 1880, and the plaintiff, as of course, had leave to amend. In due time the amendment was filed, setting forth the circular as an acknowledgment and also part payment, either of which, as well as a new promise, avoids the statute by the law of Kansas. A demurrer was filed by the defendant and

sustained, partly on the ground that there was no signature to the copy of the circular attached as an exhibit to the amendment, and partly on the merits. At that time, the law of Kansas, as enunciated by its Supreme Court in the case of Hanson vs. Towle, 19 Kansas, 281, was that an acknowledgment must not only acknowledge the debt, but express *a willingness to pay* the same; the Supreme Court of the State thus interpolating into the statute an element not found in it and not requisite to a perfect and complete acknowledgment.

The plaintiff again amended by leave of the Court, by adding the signature to the copy of the circular attached as an exhibit to the first amendment, which signature had been omitted by a clerical error merely; and the plaintiff was then prepared to stand against the demurrer that was then interposed and take the case to this Court, as he was advised that the decision in 19 Kansas (*supra*) was not sound law. While the case was pending on the demurrer, which raised the question of the sufficiency of the circular as an acknowledgment, the Supreme Court of the State, in Elder vs. Dyer, 26 Kansas, 604, modified the opinion in 19 Kansas (*supra*), and held the *element of willingness* to pay *not to be essential* to an acknowledgement under the statute. At about the same time the Circuit Court, in case No. 3,404 (Wade vs. County Commissioners of Leavenworth County, *not reported*), arrived at the same conclusion as the Supreme Court, returned to sound principles, and sustained as a sufficient acknowledgement a circular much less clearly admitting the existence of a liability than the one relied on herein.

The law being thus, the defendant at the November term, 1882, *withdrew* its demurrer and joined issues of fact on the making and issuance of the circular—in short, denied the averments of the amendment as to acknowledgment and payment in part. On these issues the case was tried and during the argument of

plaintiff in reply, the Court orally announced its judgment for plaintiff. Many facts and circumstances were shown in favor of plaintiff other than appear in the findings; but upon settling the findings at the close of the term, Judge McCrary having left, they were omitted. Amongst the most significant of these facts was the continued collection of a tax to pay the special improvement or MacAdam bonds, by defendant, and the existence of a fund in the treasury of the city, derived from this special tax. We recite this only as showing that the plaintiff in error would derive no practical advantage by the reversal of the judgment, as these omitted facts would furnish ample ground for a *venire de novo*, and they would secure, in all probability, another judgment in favor of the defendant in error.

It is confidently submitted, however, that the judgment of the Court below is abundantly sustained, both by reason and authority. It is indeed difficult to see how any other conclusion can be supported by serious argument.

Statement of Case.

The defendant in error brought his action as a holder of certain bonds of the City of Fort Scott, Kansas, after the same had been outlawed under the five years' limitation of said State, claiming by amendment that the debt had been revived by an acknowledgment within the provisions of Sec. 24 of the Gen. Stat. of Kansas of 1868, less than five years before the commencement of this action. The section under which his right of action is claimed, reads as follows:

"Sec. 24. In any case founded on contract, when any part of the principal or interest shall have been paid, or any acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment,

acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

The language of the acknowledgment relied on is found by the Court below to have been used by plaintiff in error, first, in a report of the finance committee of said city made to the City Council in writing, and adopted by said Council August 21, 1878; second, in the records of the meeting of said Council of said date, on which records the circular letter hereinafter spoken of was spread; third, in 100 copies of said circular letter, which were printed by the City Clerk on the direction of said Council, and sent out to holders of the city bonds. (See Finding 5th, Record, pp. 28–32, fols. 34–39.)

Certain of these printed copies were signed by the Clerk, and some, through inadvertence, were not. The defendant in error was shown one of these printed copies, signed by the Clerk. Another was given to him, and from the context of the finding (*vide* finding, 7th Record, p. 32) *the presumption* is that the one given him was also signed.

So far as these circulars, which actually came to the knowledge or possession of the defendant in error are concerned, we shall hereafter argue that, by reason of the language used therein, it can make no difference through what channels the information and knowledge reached him; or whether the plaintiff *intended*, *as matter of fact*, to make that acknowledgment which, *as matter of law*, we claim, it *has* made to him. The *reservations intended* to be made by the plaintiff in error are sufficiently pointed out by its counsel in his argument. We shall claim that no mere *intention*, *unexpressed*, and even, as we shall see, *disavowed* in the circular itself and in the records of the city, can operate to defeat the application of law to the facts.

Argument.

The language in the city records and in the circular letter, to which we respectfully direct the attention of this Honorable Court, as in itself refuting much of the argument for the plaintiff in error is *in particular* as follows:

"CITY CLERK'S OFFICE,
"FORT SCOTT, KAN., Sept. 3d, 1878.

"DEAR SIR—The *City Council* of Fort Scott, *address* "*this to each person holding bonds* of the City of Fort "Scott, Kansas.

" * * * * * *

"A statement of *our indebtedness* then, upon that "basis is as follows:

" * * * * * *

"City special improvement bonds and accrued "interest..... $45,000

" * * * * * *

"Total..... $315,000

"From this statement it will be seen that the ratio "of *our total indebtedness* to our assessed valuation *is* "about 40 per cent.

" * * * * * *

"In response to this, we ask *each bondholder* to ex- "press his views fully, stating the amount and *kind* "*of bonds he holds.*

" * * * * * *

"*By order of the City Council of the City of Fort "Scott, September 3d, 1878.*

"City Clerk."

There is no pretense that circular was not issued, and *that particular language used*, under and by virtue of *full authority* of the city.

Therefore, the *Clerk* had in no way overstepped his powers or authority. It stands as the act of the municipality. And there is not a syllable in the language omitted to qualify, modify or detract from the language quoted above. In fact, rather more is expressed, for the city professes its willingness and desire to pay all it can on *all the indebtedness recited*, and to each person holding the city's bonds, of *any* kind.

It has been held by the Supreme Court of the State of Kansas, in the latest construction given to section 24 of the General Statute of 1868, above quoted, that a debt, liability or claim would be revived under said section, either (1) by part payment; or (2) by an acknowledgment in writing signed by the party to be charged; or (3) by a promise in writing signed by the party to be charged.

"The statute," says the Court (see Elder vs. Dyer, 26 Kansas, 604; *per* VALENTINE, J., at p. 607), "does not require that *all* of these things shall exist before a cause of action is taken out of the statute, but only requires that some one of them shall exist; hence if any one of these things transpires, then the cause of action is taken out of the statute." And this is conceded to be the law to-day by the counsel for plaintiff in error (*vide* Brief, p. 4–5).

Under this construction of the statute, but two questions can arise in this case. First, was the acknowledgment sufficient in form? Secondly, was the acknowledgment made to the defendant in error?

First. *The acknowledgment was sufficient in form.*

It will be seen from the full language of the circular and from the report of the Committee on Finance that the *purpose* of the circular was to set out a specific statement of the existing indebtedness of the city, with a view to effecting a compromise and a refunding of

the total debt. It proceeds to say that a total of its indebtedness is $315,000. It gives also the total assessed valuation of the city property. It then says, "the ratio of *our total indebtedness*" (already stated to be $315,000) "to our assessed valuation *is* about 40 per cent" (*vide* Circular, Finding 5th).

This "total indebtedness" *cannot be made up* without including in it the sum of $45,000 stated to be an existing indebtedness for and on account of "City Special Improvement Bonds and accrued interest," as stated in the circular and report. And the city has premised the list or schedule of its existing liabilities by the language: "A statement of *our indebtedness*, then, upon that basis, is as follows," after which it recites the special improvement, or McAdam, bonds sued upon.

Here, then, is a declaration in the most direct form —in the form most advantageous to the city in proposing the compromise intended—that the ratio of its indebtedness to its assessed valuation is 40 *per cent.*; that its total indebtedness is $315,000; and that of that total, $45,000 is due on the special improvement bonds and for accrued interest thereon.

As to the sufficiency of this acknowledgment, *in form*, we may well quote language used in the opinions in Elder vs. Dyer, 26 Kan., 604, above referred to. Says VALENTINE, J., in that case (p. 610), "Our statute, to revive a debt or claim, requires only an 'acknowledgment of an existing liability' on the particular claim in controversy, and this acknowledgment may be in *any language which the party making it desires to use.* No set phrase or particular form of language is required; anything that will indicate that the party making the acknowledgment admits that he is still liable on the claim * * * is sufficient to revive the debt or claim; and there is no necessity that there should be a promise to pay the same, express or implied."

BREWER, J., now Circuit Judge, in the same case (p.

611), says: "An honored friend * * * has suggested this form of acknowledgment * * * 'I owe that debt; I admit that it is an existing and just claim upon me, but I will never pay it.' Here there is an express and clear acknowledgment of an existing debt, but there is not only nothing indicating a willingness to pay, but on the contrary an express refusal to pay. Is such an acknowledgment within the statute? Unhesitatingly we answer, yes."

This, it will be remembered, is the most recent declaration of the highest Court in the State where this cause of action arose. It is declaratory of the requirements not of an acknowledgment in general, but of an acknowledgment under *the particular section* upon which defendant in error relies.

Under this decision it would not have affected the sufficiency of the acknowledgment, in form, if the city had *expressly said* in its circular and adopted report *that it did not purpose or intend* to pay the $45,000 principal or accrued interest on the special improvement bonds. They stated in the most direct and express manner that they *were indebted* to that amount on these bonds; and there is nothing even in the report or resolution directing the sending of the circular, to qualify or detract from the express, voluntary declaration of the existing indebtedness, or to *suggest* that the liability was not a just one.

There is no force in the suggestion of counsel for plaintiff in error that the bonds held by defendant in error were not identified as referred to in the circular. The bonds sued on were shown to be special improvement bonds of the City of Fort Scott; and if the bonds or the indebtedness referred to in the circular were other than these bonds or this indebtedness, the burden of proof was upon plaintiff in error to show that fact.

Whitney vs. Bigelow, 4 Pick., 110.

As the case of Hanson vs. Towle, 19 Kansas, 273, has been somewhat extensively relied on in the argument for plaintiff in error, it may be but proper to remark that that case is to a great extent overruled by by the latter decision in Elder vs. Dyer, 26 Kansas, 604' and that the whole effect of 19 Kan., 272, as related to the present discussion, is summed up by BREWER, J., in Elder vs. Dyer (26 Kan., at p., 611), as follows:

"All that was in the thought of the Court at that time was to make emphatic the idea that an acknowledgment was *an unequivocal admission* of a present and subsisting liability, and not *a mere casual reference to some paper*, which *might or might not* be a valid claim against the party thus referring thereto."

Now, the language of the report, records and circular, above quoted, and relied on as an acknowledgment herein, is not *a mere casual reference*. The indebtedness on the special improvement bonds was as much as any other listed indebtedness, the *raison d'être* of the circular and of the offer of compromise which it contains. The debt sued on was in no manner treated or spoken of as less important than, or as in any sense subordinate to any other listed liability. In fact, the admission is in such express and unequivocal terms, and so immediately related to the very object and purpose of the report and of the circular, that we do not think it necessary to do more than point out those terms and that relation.

As to the matter of signature, it is not claimed that there was any irregularity in the minutes of the City Council of the City of Fort Scott, or that they were not properly signed by the Clerk. The *presumption* would be (were it so claimed) that the officer had properly done his duty and signed them, in the absence of any proof to the contrary. We have already seen, and the findings show, that the clerk had signed a circular which was *shown* to defendant in error and that another circular was *given* to him, and there is no

reason to suppose that this was not properly signed. In fact, that point is not raised or disputed by plaintiff in error.

It may be well to quote here the language of the late Judge FOLGER from an opinion written by him when on the bench of the Court of Appeals of the State of New York. The case is that of the "Argus" Company vs. The Mayor, etc., of Albany, 55 N. Y., 499, and was one in which the question was as to the competency of the minutes of the Common Council of the City as "a note or memorandum in writing, subscribed by the party to be charged," as an avoidance of the statute of frauds. Judge FOLGER says (p. 501):

"In this case the party to be charged, and whose subscription is needed, is the defendant, a municipal corporation. It is plain that such a party can make no note or memorandum, nor subscribe the same, save by some officer or agent thereof. It is so, also, that it ordinarily acts by its legislative or governing body, and that the action of that body is expressed in the minutes of its action, recorded as it takes place, in books kept for that purpose by the Clerk or Secretary. * * * This is a satisfactory compliance with the statute. It meets the purpose and intention of the law by providing an enduring and unchanging evidence of the agreement; and it meets its letter, for there is some note or memorandum of it in writing, subscribed by the party to be charged thereby, the subscription made by an authorized agent."

By parity of reasoning, the acknowledgment herein standing on the records alone was a sufficient acknowledgment in form, independent of the printed circular, subscribed by the clerk. And while the issue in the "Argus" case (*supra*) was as to the bipartite agreement, requiring a *consensus animum*, there is nothing in the nature of an acknowledgment requiring the meeting of minds. It is the voluntary act of one party, and is strictly unilateral. Of this, however, we shall have

occasion to speak in considering the second question in this case.

Secondly. *Was the acknowledgement so made as to revive the cause of action?*

1. We have already said that the particular language relied on as an admission was used in a report in writing on the indebtedness of the city, made by the Finance Committee of the City Council to said Council, and adopted and spread upon the minutes of the meeting at which it was made, and that it was also used in one hundred printed copies of the circular letter, which the Clerk was instructed to obtain and to send out. The report of the Committee recommended that these copies be sent to "each person holding city and school district bonds, except MacAdam bonds, about which we make no report."

Then followed the circular letter in full, as a part of the report. The resolution, set out at the end of the 5th finding (Record, p. 32) is:

"On motion, the City Clerk was instructed to have one hundred copies printed of the circular letter, with the report of our Finance Committee on our indebtedness, as the city attorney may direct, to be sent to the holders of our city bonds."

The phrase, "with the report of the Finance Committee," was only intended to identify the circular letter. The resolution might as well have said, "the circular letter which is with (or annexed to) the report of the Finance Committee." And it was so interpreted by the officers of the corporation.

On the report and resolution the Clerk sent a copy of the circular letter to each holder of city bonds other than the MacAdam bonds (by which name the special improvement bonds were commonly known).

The plaintiff in error relies upon the fact that no

copy was actually sent by the Clerk to the defendant in error, and the additional fact that the City Council did not intend a copy to be sent to him. Hence, he argues, the acknowledgment was not made *to the defendant in error*, and he cites several decisions of the Supreme Court of Kansas to the effect that the acknowledgment to revive the debt, within the statute, must be made to the creditor himself, since the Kansas Courts have held the Statute of Limitations to be a statute of repose, and not of presumption merely.

We deny that the mere fact that the City Clerk was not instructed to mail one of these copies to defendant in error, or that the Clerk did not in fact mail one to our client, forms a sound basis for such an argument or warrants the conclusion at which our learned adversary arrives. The fact that the letter was printed with a dotted, blank headline, on which was intended to be written the name of the person to whom it was mailed, followed by the words "Dear Sir," does not render this omission any more emphatic. Nor is the *reason* why the Clerk did not mail such copy to defendant in error in any sense material.

The very first declaration in the circular is: "The City Council of Fort Scott *address this to each person holding bonds* of the City of Fort Scott, Kansas," and near the close of said circular is the statement: "In response to this, we ask *each bondholder* to express his views fully, stating the amount and *kind of bonds he holds*."

The whole circular bears intrinsic evidence that though *mailed* to certain individuals, it is "addressed," as it is declared to be, to a general mass of creditors, holding a vast floating and fluctuating claim, in the shape of transferable securities. The bonds of the defendant in error are listed therein, and he is clearly one of those to whom the City of Fort Scott "addressed" the language of the letter.

That language clearly excludes the idea that the per-

son mentioned as "dear sir," is the only person whom it is applied to. In fact, it only applies to him through the existence of the condition afterwards recited, namely; that he is *a holder* of the city bonds. And if "dear sir" had negotiated his securities before the circular reached him, and ceased to be within this major category, the language would speak to his successor in interest, as it does, in express terms, to every holder of the bonds. It is certainly addressed to any of the public who may fall within the category and the ownership of the writings obligatory is *the only criterion* by which to ascertain or identify the person to whom it may apply.

Nay more, it is one of a well-known and well-recognized kind of communications between the class of debtor corporations and creditors public. It stands, on its face, undistinguished from a usual form of communication, with nothing unusual or exceptional about its method of transmission. Through the ordinary avenues and channels, an overburdened municipality seeks to reach all those to whom appeal can be of benefit or avail. Such, and such only, can be its recognized form and bearing.

Had there been anything *in the circular* to show expressly that it was not intended to reach or to be relied on by the holders of the special improvement bonds, there would be some color for the argument of the plaintiff in error; but there was nothing private in its character or restrictive of its expressions, except a distinct and particular and itemized schedule of the various bonded indebtednesses, which brought the defendant in error expressly within its terms.

The Court of Appeals of New York State has, in the case above cited (55 N. Y., 499), sanctioned the recognition by Courts of the peculiar features and characteristics which mark all acts of a municipal corporation, and which make it natural that all their contracts and agreements (so, also, their admissions), should be

in writing, and not oral. In the writing is contained all the evidence of the corporate act. And we argue that having set its seal, so to speak, to the language, uttered through its *best* and *only* medium of utterance, no reservation unexpressed in the circular itself, though intended, could impair the terms of the acknowledgment.

If this be so, then, as soon as the circular came to the knowledge of the defendant in error—if it in fact reached him, as the language expressly declared it was *intended* to reach him—it can make no difference *how* it reached him; so also, no mental reservation on the part of the agents, officers and authorities of the municipality—carefully suppressed from the circular itself—can detract from the sufficiency of the admission which he has received, and on which he has relied. This was no private letter; it was stated to be "addressed" to the defendant in error. The authorities cannot now be allowed to plead that they were guilty of falsehood when they stated that it was thus "addressed" to him; and it makes no difference if it were wafted to him on the winds of heaven—whether it reached him through the mistake of man, or the providence of God.

Suppose, if you please, that a holder of one or more bonds of another class—say, City Bridge and Funding Bonds—had not been sent a copy of this letter, but had seen a copy of it and had relied upon it to interrupt the running of the Statute of Limitations, and had not brought his action within the original limit of five years after the contract. Would it be a defense that the circular had not been *sent* to him, personally? Yet, it is respectfully submitted, there is nothing in the circular to show that it was not addressed as much to the defendant in error as to any holder of City Bridge and Funding Bonds.

Something, truly, is said, in the circular, as the counsel for the plaintiff in error justly remarks, about the

value received for all classes of bonds except the special improvement bonds in question; it is indeed stated that the city has received practically no value, but rather damage, in return for the "city railroad debt." But this, we submit, leaves the admission as to the special improvement bonds only the more ample, broad and unqualified, since no suggestion of dissatisfaction as to the special improvement bonds is made. But our learned opponent is in error when he says that no proposition was made to the holders of Special Improvement bonds. The general proposition of compromise is made to *all bondholders*, and we have not yet seen it denied that defendant in error was a holder of some bonds of the city at that time.

2. But, although the receipt by defendant in error of the circular letter constituted a sufficient acknowledgment *to him*, the spreading of the language of the circular letter on the minutes of the City Council—the public records of the municipality—was without more also a sufficient communication of the acknowledgment *to him*.

A municipality acts neither with the freedom nor with the privacy of a natural person. As the public are interested in every deed it may do, and as all its concerns are matters of public interest, all the acts of its agents or officers are required to be recorded and the minutes of a City Council are public records, open to the inspection of all comers. We argue, and the Court below held, that the spreading of the language of the acknowledgment upon this record was notice to all the world and a publication to all whom it might concern, and to the defendant in error in particular.

For instance, the Council could not, by resolution, have limited the effect of this act; it could not have resolved that "we record the language of this circular letter only for the inspection of the holders of bonds other than Special Improvement Bonds." The language of the admission speaks for itself, and the law

has defined the record as speaking to all the world. The language of the report, in recommending that it be also *sent* "to persons holding City and School District Bonds, except MacAdam Bonds, *about which we make no report*," does not affect the recorded acknowledgment, and the latter stands as unqualified. If the committee have made what amounts in law to an acknowledgment of the bonds in litigation, their declaration that they "make no report" stands contradicted by the language of the record and is no more than an *expression of the opinion* of the committee as to the construction of its own act; and that opinion is erroneous in law.

The argument of the learned counsel for the plaintiff in error, on p. 13 of his brief: "Hence, had the City Council, the day after it adopted this report of its Financial Committee, rescinded its action and done nothing further, it could not be claimed that an acknowledgment was made to any one"—is inconsequential and fallacious. The record is "an enduring and unchanging evidence" (55 N. Y., 499); and the acknowledgement *having been made*, the cause of action is revived *eo instanti*. As well might a creditor who had made an express and unqualified promise to pay, in writing, subscribed by him, hope to defeat the promise by attempting to recall it, in a letter written the next day, or *the next year* for that matter.

The Court below has held that the spreading of the admission on the municipal records was a sufficient communication or publication of the acknowledgment to defendant in error and to all the world besides; that it was the most appropriate and binding form in which the city could make an acknowledgment. And no sufficient reason has been stated or even suggested on behalf of the plaintiff in error, why this holding is not good in law, or why it should not be affirmed.

General Considerations.

Several general questions are suggested by various parts of the brief for the plaintiff in error, which it has seemed best to us to group together at this point in our argument, rather than to inject them into the discussion of the two principal points which we have sought to make in this case.

First. The *first* of these is suggested by the argument of our learned opponent, at p. 7 of his brief, where he says: "Such an acknowledgement, to be binding, amounts really to a contract; that is, it is in effect a contract to revive a stale and dead contract. No contract can be made unless by proper parties." This might be more properly said of a new promise to pay, but of an acknowledgment it is not true. It is not so regarded in the decisions of the Supreme Court of Kansas under the statute. And while those decisions lean towards regarding the Statute of Limitations as a statute of repose, rather than as a statute of presumption, the weight of authority still is that the Statute of Limitations impairs the *remedy* only, and *not the contract*.

There is a certain elaborate inconsistency in the rulings of the Supreme Court of Kansas; in that, while it holds, on the one hand, that the Statute of Limitations is a statute of repose (which would be expected to require that an acknowledgment or new promise must amount to *a new contract*), it at the same time requires the action to be brought on the *original contract* and *not* on the new promise to pay or the acknowledgment. If the statute were one of *repose*, there is no sufficient reason in law why the action should not be brought on the *new contract*, namely, the new promise to pay, on the one hand, or the acknowledgment on the other.

The fact is that the Supreme Court of Kansas, while *saying* that the Statute of Limitations is one of *repose*, continually and consistently *construe* it as a statute of *presumption* only.

Secondly. The counsel for the plaintiff in error, after reciting the holding of the Court below, says, upon page 11, of his brief: "If this ruling be true to the extent held by the Circuit Court, then a most dangerous rule has been established, since it is equivalent to saying that no matter how old or stale may be the indebtedness of a public corporation, *no matter how many years it may have been outlawed*, yet if an attempt is made looking to an adjustment, and in doing so that something concerning them is spread upon the minutes, even though accompanied, as in this case, with the statement that 'nothing is intended to be said to the holders of these particular bonds', still it is to be construed as an acknowledgment of the full amount claimed upon these stale demands, and the city thereby held."

Without assenting to the use made of our mother tongue in the language quoted, we unhesitatingly join issue with our learned opponent on the proposition which he evidently intended to advance. We say:

If any attempt is made looking to an adjustment of indebtedness, and if, in making that attempt, the corporation spreads upon its record an ample acknowledgment that it owes the debt, the corporation will be held thereby, under the present laws of Kansas. The "*attempt* at adjustment" presupposes the *existence* of the *debt*, and the recital of its existence constitutes an acknowledgment—is indeed the most natural form of acknowledgment.

We do not think it necessary to comment on the part of our opponent's brief which is in quotation

marks, at p. 11, line 31 and 32 of said brief, since nothing of the kind appears on the face of the report or circular; and since, if such language were interpolated into the minutes, it would not defeat the language of the circular or of the record. *Intention* is not the gist of this action. The argument for plaintiff in error is, in that respect, answered in the second point, made above.

Thirdly. In answer to the argument of counsel for plaintiff in error, contained in the paragraph beginning four lines from the bottom of page 12 of said brief, we reply that in the case supposed it would make all the difference in the world whether the debtor *stated* in express language that he did not consider himself morally or legally bound to the creditors of "Class B" or not. If he *held himself out* as morally and legally bound to them—no matter what were his belief—and if the unqualified acknowledgment of the debt reached the proper party, it would be good in law and take the case out of the operation of the statute.

Fourthly. The mention and acknowledgment of the special improvement bonds is by no means *incidental*. The argument of counsel for plaintiff in error (*vide* his brief, paragraph 2, pp. 14–15), is not cogent or germain in any respect.

Fifthly. There is a certainly novel argument advanced on page 15 (paragraph 3) of the brief of counsel for plaintiff in error, wherein he asks: "3. But does the City Council, the governing body of a munici-

pal corporation, have the power to revive a debt already barred?" &c.

The counsel forgets that the governing body *is the city*—the *living* and *present* municipality. Its acts are *not representative* but *substantive*.

The point, therefore, as to the inability of an administrator—a *representative of a deceased person*—to revive a debt, is of no utility to plaintiff in error.

Sixthly. We hardly comprehend the purpose of paragraph 4, pp. 16–17, of the brief for plaintiff in error, since we do not rely on a *promise to pay*, conditional or otherwise.

In Conclusion.

We are loath to assent to the doctrine that an acknowledgment under the Kansas Statute must be made to the creditor, although we believe the Court should hold it to have been made to defendant in error in this case. To require the acknowledgment to the creditor direct is to interpolate into the statute a provision which it does not contain. Section 24 Genl. Stat. Kan., 1868, would seem to have pointed out, with particularity and care, the essentials of the acknowledgment which it contemplated, and it is strange that it should not have *expressed* this condition, if it were intended, as well as the conditions which *are* expressed: namely, that it shall be in writing, signed by the party to be charged.

In this respect, Section 24 would seem to have been framed to meet the Statute of Limitations on the footing of a statute of *presumption* and not of *repose*.

But however this may be, the question of the sufficiency of an acknowledgment is a question of general jurisprudence, in the disposition of which the Federal

Courts are independent of any construction which may have been given to the statute by the decisions of the State Courts.

17 Fed. Reporter, 109.
20 Fed. R., 757.
Edwards vs. Davenport.
14 Wall., 665.
16 Peters, 1.
18 How., U. S., 520.
92 U. S., 494.
90 Id., 806.
18 Wall., 584.

Upon this question, we know of no more apt expression than that found in the opinion by NELSON J., in Soulden vs. Van Rensselaer, 9 Wend., 293. Says that eminent jurist, at p. 297: "The Statute of Limitations operates only upon the *remedy* by affording *a presumption of payment*, and hence the acknowledgment of the existence of the debt revives the debt *by removing the presumption*, and upon this ground, *it is obviously unimportant to whom the acknowledgment is made.*"

The judgment of the Court below should be affirmed.

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WAYNE MCVEAGH,
Of Counsel.

112-152

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CITY OF FORT SCOTT, IN THE STATE OF KANSAS, *Plff. in Error.*
vs.
SAMUEL G. HICKMAN, *Deft. in Error.*

Error to the Circuit Court for the District of Kansas.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Banner Publishing Company, Printers, Fort Scott, Kansas.

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Reply Brief for Plaintiff in Error.

Had the counsel for the defendant in error confined himself solely to this case and its facts, it would have been necessary to have said but little by way of reply, but as many things purporting to be matters of fact are misstated under the heading of a so-called "History of the Case," or mistakenly stated, it is probably better that the court should have its attention again called to the

case as it is, so far as necessary. Counsel for the defendant in error seems to set great store by the fact that on November 8th, 1875, one of this series of bonds, No. 77, was paid in full, and a partial payment of $290.00 made upon another of these bonds. Just how or in what manner a payment to one man upon one bond or note revives another bond or note held by another man, counsel does not point out, but on pages 1 and 2 of his brief he says:

"August 6th, 1875, the City Treasurer, the proper financial officer, wrote to the fiscal agents of the city, in New York, an explicit acknowledgement of the indebtedness of the city on the bonds of Mr. Hickman. * * * August 11th, 1875, the same officer sent $500 of the money of the city [here follows at least a mistake, since being in quotation marks one would infer it was quoted from one of the letters set out in finding No. 4, which is not so,] 'to apply on interest due on *Mr. Hickman's bonds.*'" Now, no such language as this is used, as seen by the letter, (p. 28), which is as follows:

"FORT SCOTT, KS., Aug. 11, 1875.

Messrs. Donnell, Lawson & Co., New York:—

GENTLEMEN:—I enclose you herewith dft. for $500, to apply on interest due on Fort Scott City special improvement bonds. If not convenient to apply on interest, use to pay on bonds.

Respectfully yours,

J. H. RANDOLPH."

As seen, no mention is made of Mr. Hickman, nor is it probable that the City Treasurer knew of the existence of such a man as Mr. Hickman, nor is he mentioned in either letter.

Immediately following this letter, on page 28, in finding No. 4, is this language:

"On November 8th, 1875, said fiscal agents paid bond No. 77 of this series, and said $290.00 on said bond 78, *they being the only bonds presented to that date*, which payments exhausted the funds in the hands of said fiscal agents."

From this is seen just what was done, that nobody presented

any bonds except these two, and the money was applied on them.

From which it is also fairly to be inferred that Mr. Hickman did not then own either of these two bonds, for the findings do not so declare, while, had he then owned them, counsel would have proved it, and have had it put in the findings, since he places so much store by the fact of this payment. The previous letter of the City Treasurer—p. 28—gives the Nos. of many bonds evidently not held by Mr. Hickman, as shown by the Nos. of his bonds set out in findings 1 and 2, from which one would be led to believe that he had bought these bonds up long since the date of that payment as a mere matter of speculation, and hence may not command the sympathy counsel invokes. These letters of the City Treasurer are set out in finding No. 4, and speak for themselves, while that finding also declares—p. 27—"that said payment on bond 78 was made by Donnell, Lawson & Co., fiscal agents of the State of Kansas, upon the authority of certain letters sent them by J. H. Randolph, City Treasurer of the defendant, written by him in the usual routine of his official duties, *but without any special instructions or knowledge on the part of the City Council of said city*."

Now, it is not shown how or by what authority a subordinate officer could make an acknowledgment that would bind the city, especially an acknowledgment made without the knowledge of the City Council, which is the governing body of such a corporation, and the only body that could make or authorize such an acknowledgment; nor were these letters sent to or ever seen by Mr. Hickman—but to mere fiscal agents of the state and city. That this payment of $290.00 on bond 78 was reported to and approved by the City Council is true, these letters of the City Treasurer, however, never were reported to the Council, and that this payment, so made and approved, revived the liability of the city as to said bond 78, is and always has been conceded, as shown by the answers of the city, pp. 18, 23, 24, and, beyond doubt, it had no other or further legal effect. This money was sent to the fiscal

agents of the State of Kansas, as the law required all municipal officers should do, [Laws of 1874, p. 108; C. Laws of 1879, p. 461,] and this remittance is declared in finding No. 4 merely to have been routine duty. The fact that the City Treasurer made reports of these payments to the City Council in the usual routine of his duty, as required by law, can be of no avail, and "cannot be held as an acknowledgment which should interrupt prescription."

Conger vs. New Orleans, 32 La., An., 1250.

Nor could this be so, because under the laws of Kansas such an acknowledgment "must be in writing, signed by the party to be charged thereby."

Def's. Brief, p. 7.
Green vs. Goble, 7 Kan., p. 301.
Clawson vs. McCune, 20 Kan., p. 342.

Evidently such an acknowledgment to charge or bind the city must be done by authority of the City Council, while, as before shown, the Supreme Court of Kansas holds that any acknowledgment to be effective must be to the party claiming the benefit thereof, and not to a third party. The letters of the City Treasurer were written to a fiscal agent of the State and city, and hence were merely like a man speaking to himself. So his reports to the City Council of his disbursements, as also the report of the financial committee of August 21st, 1878, which embodied this circular, were reports concerning the internal business affairs of the city, and were also like an individual speaking to himself and were not addressed to the public; and when the circular was finally sent out the city certainly had the right which it then exercised, that of addressing it to such bondholders as it desired, and that was not to send it to any holders of this class of bonds, and as the findings show, it was not sent to any holders of the class of bonds sued on in this case.

Neither is it quite true that the only allegation made by the plaintiff in his last amendment—p. 14—was merely to cure a

clerical error by stating that the circular set out in his previous amendment "was signed by the City Clerk," for he also alleged in the last paragraph of that amendment—p. 14—that "on the 8th day of November, 1875, the said defendant recognized the existance and validity of the said plaintiff's said bonds by the payment to him on that day of the sum of two hundred and ninety dollars ($290.00) on account thereof." Obviously with an allegation of a general payment applied on all these bonds a demurrer must have been overruled, and hence it was withdrawn and issue joined. Had plaintiff merely alleged the real fact, that of a payment then made on a particular bond, No. 78, the defendant might have presented and stood upon its demurrer, but plainly in view of the form of the allegation, defendent could not do this.

On page 6 of his brief counsel very kindly suggests, as a relief to this court in affirming this judgment, that other facts claimed to be material could be shown, but probably the court will decide upon this case as it now stands.

It might, perhaps, be noticed that counsel varies materially in his "statement of the case" from his "history of the case." The careful consideration of the court is, however, invited to the record of the court and the special findings of fact as best showing what the court is called upon to consider.

In his "argument"—pp. 9, 10, 11—counsel appears to mean that the decision of the Supreme Court of Kansas, in Eder vs. Dyer, 26 Kan., 604, is binding upon this court as a construction of this statute of acknowledgments, while later on he insists that no construction by the State Supreme Court is binding upon the Federal courts and quotes several Federal decisions. It is quite true that in matters of general law the Federal courts are not bound by state decisions, but in all cases resting upon the effect and construction of state statutes the rule is the other way. If there were no state statutes governing acknowledgments of debts, then, plainly, it would be a matter of general law, and the Federal courts would follow their own decision; but there being a state

statute, then, plainly, some court must construe its force and effect, and one rule of construction of this statute, made by the Supreme Court of Kansas, as shown in the original brief of plaintiff in error, —pp. 5, 6, 7, 8,—as of all other courts, apparently, is that the acknowledgment must be *to the creditor* claiming the benefit thereof and *not to a stranger or to a third party.*

While counsel has failed to find a single decision controverting this rule, he quotes from Soulden vs. Van Rensslaer, 9 Wend., p. 297, that "it is obviously unimportant to whom the acknowledgment is made,"—but that expression is to be considered in view of the facts of that case, which were that the acknowledgment was made *to the holder while he still held the note*, p. 294, and reference is made to Dean vs. Hewitt, 5 Wend., 257, which also is a case where the new promise or acknowledgment "was made whilst the notes were the property of the payee" and was made to him whilst he was the holder,—while in this case the circular was not sent to and Macadam bondholder. This latter case also holds—p. 261—that where a debtor makes the conditional offer to pay when able, the condition must be complied with and his ability to pay shown, as is also held in Mattocks vs. Chadwick, 71 Me., 313. Upon the same principle, as argued in the original brief of plaintiff in error, if this circular is in any event to be held as an acknowledgment, it was a conditional one, the condition being "that a compromise be fully agreed upon by the time our legislature meets in January next," and to make it binding according to this rule it must be shown that this condition was complied with by the holder of these bonds.

If, however, the rule be as claimed by counsel for defendant in error that this court will not be bound by the construction of this statute as made by the Supreme Court of Kansas, but will follow general rules and its own decisions, then this court will follow the rule laid down in Bell vs. Morrison, 1 Pet. 351, which declares that the acknowledgment must be such as implies that the party is willing to pay the debt, and clearly a proposition to agree upon

a compromise does not imply a purpose to pay in full as is now claimed. It will be noticed that the lower court followed Bell vs. Morrisson and Hanson vs. Towle, 19 Kan., 281, to the same effect, in ruling upon the first demurrer to plaintiff's petition. See record, p. 20, while on the final trial it followed Elder vs. Dyer, 26 Kan., 604.

Then, since this so-called acknowledgment was not made to Mr. Hickman, nor to any other holder of these bonds, this judgment must be reversed if the rulings of the Supreme Court of Kansas are to govern, and if the rulings of the Supreme Court of the United States are to govern then the judgment must be reversed because the acknowledgment does not imply a willingness or purpose to pay.

All other points in this case are probably sufficiently presented in the original brief of plaintiff in error and need no further comment here. The case is respectfully submitted.

J. D. McCLEVERTY.

Attorney for Plaintiff in Error.

Fort Scott, Kansas, October 13th, 1884.